Central Law Journal.

ST. LOUIS, MO., OCTOBER 12, 1906.

LIABILITY OF COMMON CARRIER WHERE THERE IS AN EXPRESS PROHIBITION NOT TO ALLOW INSPECTION BEFORE DELIVERY.

There seem to be no decisions where the matter of this discussion has been directly determined by any of the higher courts. The importance of this subject is growing daily because of the increase of the fruit business and the custom adopted by fruit growers associations in various parts of the country of selling their fruit at shipping point and thereby relieving the association of any further liability. In these cases the carrier is instructed not to allow inspection before delivery. In Hutchinson on Carriers, Sec. 393, we find the following: "The consignee is entitled to an opportunity to inspect the goods, and this opportunity the carrier is bound to afford him even though he may have instructions not to deliver them till they are paid for. The carrier may even permit the consignee, upon depositing with him the charges upon the goods, to take them away, with the understanding that if they do not answer to the quality of the goods ordered by him, he may return them and take back his money." This opinion is predicated upon a case where the consignee had ordered a coat of a certain description and paid the price to the carrier, upon condition that if upon examination it should prove unsatisfactory he might return it and receive back his money. It was there held that the carrier was not liable. Lyons v. Hill, 46 N. H. 49. In the latter case the package contained a letter saying the coat was of different material from that which had been sold the consignee. The money was paid to the carrier upon the express condition that if the coat was not that which he bargained for the carrier would return the money to him, the inspection showing that the material was different from that bargained for. While the condition was that the coat was to be paid for upon delivery there was not in that case an express prohibition not to allow inspection. The permission to inspect was not a delivery. Judge Outcalt in commenting upon this case in that of Aron v. Adams Express Co., Hamilton County (Ohio) Common Pleas, 27 W. L. B. 183, said: "There is no breach of contract in allowing this privilege to consignee in the absence of an express prohibition." Of course it follows that, had there been an express prohibition from allowing such a privilege, there is no doubt but what the opinion of the court would have been different. In the very recent work, Moore on Carriers, p. 216, we find that "conversion implies a wrongful act, a misdelivery, a wrongful disposition or withholding of the property," of which there must be proof. Maguire v. Dinsmore, 70 N. Y. 410, 26 Am. Rep. 608; Scovill v. Griffith, 12 N. Y. 509.

An express prohibition not to allow inspection of the goods before delivery would render a common carrier liable, if, under such conditions inspection were allowed by the carrier. Under such circumstances there would be a wrongful disposition, therefore, a conversion. Judge Outcult is thus borne out by the principles laid down by the above authorities. Growers of fruit to be shipped long distances, where they have sold the fruit at the shipping point, make prices in view of the fact that experience has shown that the drafts given in payment of such prices have frequently been turned down after inspection upon the arrival of it at destination, although the fruit had passed inspection at the shipping point. A bad condition upon arrival may have been the result of the negligence of the carrier or some other cause, and while the grower may have a remedy against the buyer he wishes to avoid complications and hold the buyer to his bargain. The purchaser buys at point of shipment accepting, as a part of the bargain inspection there. The seller sells at point of shipment at the stated price given in view of the fact that the buyer takes all the responsibility of damage thereafter and expressly stipulates that the draft be paid before inspection is allowed; the carrier accepts the shipment in view of this situation and of course would be guilty of a wrongful disposition, if then it first allowed the purchaser to inspect the fruit upon arrival at destination, and would be liable to the seller as for a wrongful conversion. On the other hand we find the case of Levy v. Weir, 77 N. Y. Supp. 917, where a suit of clothes was made to or-

der, to be inspected by purchaser before acceptance, and the carrier tendered the goods and the consignee refused to accept them, but stated that he would shortly call for them, and the carrier stored them for several weeks, when the consignee absolutely rejected them, and the consignor refused to order their return, on being informed of the rejection, on the ground that they were no longer of any use to him. It was held that the consignor could not recover of the carrier. Of course in the case of the shipment of fruit, if the consignee refused to accept the shipment the carrier would have done all that was required of it as between the buyer and seller. Its duty would then be to immediately wire the seller and not getting a reply, to dispose of it to the best advantage it could under the circumstances.

We have extreme doubts about the soundness of the position of the court which would allow a railroad company to hold a coat several weeks without notifying the consignor of the situation as appears in the above case. A carrier's duty is to notify the consignee of the arrival of the goods and give a reasonable length of time for a response, and if any delay is incurred by reason of the conduct of the consignee, a prompt notification should be made to the consignor. A delay of several weeks is unreasonable and it would seem to us that such a delay should have been held to amount to a conversion.

NOTES OF IMPORTANT DECISIONS.

CARRIERS — PARTY INJURED BY PANIC IN STREET CAR CAUSED BY A BLAZING MATCH THROWN AWAY BY PASSENGER, WHICH IGNITED PASSENGER'S DRESS.—The case of Fanizzi v. N. Y. & Q. C. R. Co. (N. Y. Sup. Ct.), 99 N. Y. Supp. 281, presents an interesting question of law. It appears that a passenger on a street car, who was smoking, struck a match and then threw it away while lighted, so that it ignited the frock of a female passenger, which blazed and caused a panic in the car, because of which the plaintiff was thrown, pushed or jumped off the car and was injured. The motorman then stopped the car and acted promptly in the emergency in extinguishing the fire. The court held such facts were insufficient to establish negligence on the part of the company. In the appellate division of the supreme court the decision was sustained. Mr. Justice Jenks rendered the opinion as follows: "I think that the learned county court did not err. (1) Without regard to the rule. There is no proof tending to show negligence after discovery of the accident. On the contrary, the testimony shows that the motorman stopped the car, and then acted promptly in the emergency in extinguishing the fire and in saving the passenger from injury. I cannot discriminate the case from that of Sullivan v. The Railway Co., 133 Mo. 1, 34 S. W. Rep. 566, 32 L. R. A. 167, which in its facts is strikingly similar. The judgment in that case absolves the defendant upon grounds that to me seem cogent and convincing. (2) With regard to the rule. If the passenger who struck the match had not sat in such proximity to the woman with the flimsy frock as that a flaring match carelessly cast aside might come in contact with the frock, then there would have been no burning of the frock from that cause; and if the passenger had not required a lighted match he would not have struck it; and if he had not been smoking and desired to relight his cigar, or cigarette or pipe, or proposed to smoke, he would not have struck the match; and if he had not struck the match it would not have been aflame, so as to ignite the frock; and if the passenger had complied with the regulation, or it had been enforced when he broke it, then he would not have smoked or have begun to smoke in that seat. But until you can predicate of a passenger who is smoking or proposes to smoke, while occupying a seat other than those reserved for smokers, that as the result of such act he will strike a match and will cast it aside while aflame in such a fashion as to ignite any inflammable material then near him, 'you have,' in the words of McSherry, C. J., in Tall v. Steam Packet Co., 90 Md. 259, 44 Atl. Rep. 1010, 47 L. R. A. 120, 'speculation.' The learned judge further says: 'You may have a sequence of events which are purely accidental in their relation, but are not inherently or necessarily the successive results of preceding causes.' In Tall's Case, *supra*, during a game of cards played in the defendant's boat, a dispute arose, angry words followed, and one of the gamesters shot at his opponent, missed him, and hit the plaintiff. The trial court excluded a rule that prohibited gambling on the boat, and the court of appeals held that the ruling was proper, inasmuch as even if the captain had violated any rule, that fact was not evidence of negligence that contributed to the injury. The discussion on the judgment seems to me lucid and logical, and the principle asserted is applicable to the case at bar. Writing for this court, I have discussed the question of proximate cause at great length in Trapp v. McClellan, 68 App. Div. 362, 74 N. Y. Supp. 130, and I think much of that discussion is germane to this case. The request for submission was limited to the question whether the violation of the rule against smoking, save in the last three seats, was the cause of the accident. There was no dispute as to the facts, and therefore the question of proximate cause was for the court. Hoffman v. King, 160 N. Y. 618-628, 55 N. E. Rep. 401, 46 L. R. A. 672, 73 Am. St. Rep. 715."

MASTER AND SERVANT—WHERE PARTY EMPLOYED FOR A YEAR IF COMPETENT, THE BURDEN OF PROOF IS ON THE EMPLOYER TO SHOW INCOMPETENCY.—In a recent opinion by the Supreme Court of Tennessee in the case of Mobile, J. & K. C. R. Co. v. Hayden, 94 S. W. Rep. 940, the plaintiff was employed by a railroad company under a contract alleged by the company to be dependent upon the contingency that he should prove capable, efficient and satisfactory, and the defendant claimed that plaintiff was discharged because of incompetency. The court instructed the jury that if the above was a part of the contract, the burden of proof was upon the defendant. One of the contentions was upon this point, counsel for defendant citing the case of Allen v. Mutual Compress Co., 14 So. Rep. 362, an Alabama case decided in 1893. In that case the opinion states that "the defendants employed the plaintiff for a period of five months at two dollars per day to sew and tie cotton bales for the compress. After serving a little more than one month the defendant paid the plaintiff for the time of the service rendered and discharged him, claiming that under the contract he (it) had the right to discharge the defendant (plaintiff) whenever it became dissatisfied with the services of the defendant (plaintiff), and that it was the sole judge of the sufficiency of the cause. The contract in that case provided as follows: 'We guaranty to give satisfaction in sewing and tying, or any other work that we may be required to do.' The defense to the complaint was that plaintiff failed to give satisfaction. The court said: 'The authorities are not altogether harmonious. In some it is held that a stipulation of similar import in a contract arms the party for whose benefit it is made, with unquestioned authority to consult only his own judgment, will or feelings, and the reasonableness of the grounds of dissatisfaction is not a matter of inquiry. Cline v. Libby (Wis.), 49 N. W. Rep. 832, 32 Am. Rep. 700; Gibson v. Cranage (Mich.), 33 Am. Rep. 351, and authorities cited in note; McCarren v. McNulty, 7 Gray (Mass.), 139; Tyler v. Ames, 6 Lans. (N. Y.) 280. On the other hand, there are authorities which hold that an employer cannot dismiss his servant without actual cause. Jones v. Transportation Co. (Mich.), 16 N. W. Rep. 893; Daggett v. Johnson, 49 Vt. 345.' The court held as follows: 'When, therefore, one guarantees to give satisfaction, he assumes the undertaking to perform the work in such manner as to satisfy the other, and invests the latter with full power to determine the reasonableness of the cause.' Mr. Page, in his work on Contracts (Vol. 3, § 1390), in dealing with this subject, said: 'So a contract for personal services as long as they are satisfactory to the employer, may be terminated by him at any time when he is dissatisfied in good faith, and the justice of such dissatisfaction cannot be inquired into. Thus, in case of actual dissatisfaction, whether justified or not, an employer may terminate a contract of employment as chef, furrier, or manager of a business,' citing Daniels v. Decatur County, 99 Iowa, 440, 68 N. W. Rep. 718; Sax v. Railroad Co., 125 Mich. 252, 84 N. W. Rep. 314, 84 Am. St. Rep. 572; Koehler v. Bubl, 94 Mich. 496, 54 N. W. Rep. 157; Frary v. Rubber Co., 52 Minn. 264, 53 N. W. Rep. 1156, 18 L. R. A. 644; Rossiter v. Cooper, 23 Vt. 522; Evans v. Bennett, 7 Wis. 404.

These authorities doubtless state the correct rule on this subject, but we do not think they are controlling in the present instance, since, according to the testimony of Mr. Stratton, the president of the railroad company, the duration of the plaintiff's employment was dependent upon the contingency that he should prove capable, efficient and satisfactory. It will be remembered that the president assigns as a reason for the discharge of the plaintiff his incompetency and dereliction of duty in handling the business of the company. In any view of the case, the burden of proof devolves on the defendant company to show that plaintiff's services were unsatisfactory. This was an affirmative defense, and it devolved on the company to prove it. The plaintiff was not onerated with the duty of proving in the first instance that his services were satisfactory to the defendant, although we think his testimony establishes that fact. Conceding that by the terms of a contract the greatest latitude and discretion was reserved to the company in continuing the contract, and that it might be annulled at any time, when in the judgment of its executive officers the services of the plaintiff were unsatisfactory, nevertheless the burden of proof to show that these services were unsatisfactory devolved in the first instance upon the company." Elliott on Evidence, Vol. 1, § 132.

APPEAL—A SUSPENSION APPEAL WILL LIE FROM ORDER REFUSING TO GRANT PRELIMINARY INJUNCTION, BUT DOES NOT SUSPEND OR POSTPONE TRIAL OF MERITS.—In the case of Murphy v. Police Jury of St. Mary Parish (La.), 41 So. Rep. 647, an interesting question relating to injunctions is considered by Mr. Justice Land as follows: "Relators, John Murphy and George D. Palfrey, taxpayers of the parish of St. Mary, instituted a suit against the police jury of said parish for the purpose of enjoining said body from erecting a new courthouse on the same grounds set up in the case of the State v. Jury of St. Mary Parish (No 16,101, recently decided by this court), 41 So. Rep. ——. After hearing the parties on a rule *nisi*, the trial judge refused to grant the plaintiffs a preliminary injunction, and subsequently granted them a suspensive appeal from the judgment denying the relief sought. The police jury, relator herein, complains that the action of the district judge in thus granting a suspensive appeal from his mere *ex parte* refusal to issue a preliminary injunction is without warrant of law, illegal and oppressive. We think that the relator is mistaken in this proposition. In Beebe v. Guinault, 29 La. Ann. 795, this court held that a suspensive appeal lies from a judg-

ment on a rule *nisi* refusing a preliminary injunction, saying: 'Appeals lie from final judgments. The judgment in this case refused the injunction. It will be difficult to find a judgment possessing a stronger element of finality than that.' In State v. Judge, 31 La. Ann. 850, the court said this 'is no longer an open question.' This dictum was cited and approved in State v. Jury of St. Mary Parish, *supra*, when we held in effect that the appropriate remedy was by appeal from the order refusing the injunction in *limine litis*. Relator's apprehension that the appeal from the order refusing the preliminary writ in the instant case will suspend or postpone the trial of the cause on the merits is without any legal foundation." The contrary was held in State v. Judge, 33 La. Ann. 436.

THE ACT OF CONGRESS KNOWN AS THE EMPLOYERS' LIABILITY ACT AFFECTING COMMON CARRIERS IS UNCONSTITUTIONAL AND VOID.

At common law no recovery could be had by one employee for the negligence of a fellow servant, and contributory negligence on the part of the employee was also a defense to a suit against the employer. From time to time, commencing as early as 1862, the legislatures of the various states enacted laws prescribing the rights, liabilities and duties of master and servant. At this day each state has a complete system of laws and decisions on the relations of master and servant. By the act in question, the congress abrogates the common-law doctrine, and the federal government controls all litigation arising between carriers engaged in commerce between the several states and their employees, for personal injuries to the latter, and all state laws and the decisions construing the same are, to that extent, nullified. Not only nullified, but the congress goes far beyond the trend of state legislation. Contributory negligence is no longer a defense. The doctrine of comparative negligence, long since repudiated by the courts, is resurrected by force of statute. The freedom of the carrier to contract with its employees is denied. The amount recoverable is unlimited. A mere recital of these innovations upon the law as recognized by the great majority of states is sufficient to show the importance to all common carriers as to whether or not such a law is valid. The act is set forth in the note.[1]

What is commerce between the states in which the carriers may be engaged, was lately stated in Lottery Case,[2] in which Mr. Justice Harlan, after reviewing prior decisions of the Supreme Court of the

[1] *An Act Relating to Liability of Common Carriers in the District of Columbia and Territories and Common Carriers Engaged in Commerce Between the States and Between the States and Foreign Nations to Their Employees.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states, or between any territory and another, or between any territory or territories and any state or states, or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, shall be liable to any of its employees, or in the case of his death, to his personal representative for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works.

Section 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.

Section 3. That no contract of employment, insurance, relief, benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief, benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee; provided, however, that upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief, benefit or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative.

Section 4. That no action shall be maintained under this act, unless commenced within one year from the time the cause of action accrued.

Section 5. That nothing in this act shall be held to limit the duty of common carriers by railroads or impair the rights of their employees under the safety appliance act of March 2nd, 1893, as amended April 1st, 1896, and March 2nd, 1903.

Approved, June 11, 1906.

[2] 188 U. S. 321.

United States showing the extent to which the power of congress had been exercised, said (p. 352): "This reference to prior adjudications could be extended if it were necessary to do so. The cases cited, however, sufficiently indicate the grounds upon which this court has proceeded when determining the meaning and scope of the commerce clause. They show that commerce among the states embraces navigation, intercourse, communication, traffic, the pursuit of business and the transmission of messages by telegraph." When, then, the congress used the term "every common carrier engaged in trade or commerce * * * between the several states * * * " it meant to include all railway companies, all telegraph companies, all sleeping car companies, all steamship companies, all express companies, all canal boat companies, and all other common carriers mentioned in the "prior adjudications" referred to by Mr. Justice Harlan.

The full effect of the act turns upon the interpretation of the phrase "carrier *engaged in*" interstate commerce. Does it mean a carrier conducting a general business of interstate commerce? Or, does it mean a carrier who at the time of the particular accident is actually doing an interstate transaction directly connected with the accident? In other words, does not a carrier which as part of its business transports interstate traffic, thereby fix its status under this act? The language admits of but one interpretation. That the congress intended to prescribe the liability of such common carriers for injuries to all employees, and made the sole test of the liability of the carrier that it shall be *engaged in* commerce between the several states is certain.

In the construction of all laws words are supposed to have been used with reference to their natural and ordinary meaning. In Gibbons v. Ogden,[3] Mr. Chief Justice Marshall said (p. 188): "The framers of the constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said." Webster defines the word "engaged" to mean "occupied, employed, busy;" and again, "to embark; to take a part; to devote attention and effort." It follows then, that when a common carrier is *engaged in* commerce between the several states, such carrier is embarked or employed in the business of transmitting messages by telegraph; or is embarked or employed in the business of operating a railway system, conducting a commerce between the several states; or is occupied in commerce or intercourse; and that the act has no reference to whether or not at the particular instant of the accident and in direct connection therewith the carrier was performing an act of interstate commerce.

That the term *engaged in* means what has been here outlined has also been held by judicial authority. In *Re* Mackey,[4] it was held by the District Court of the United States for the district of Delaware, that "a person engaged chiefly at farming" within the meaning of the Bankruptcy Act, excepting from its provisions a "wage earner or a person engaged chiefly in farming or the tillage of the soil," is one whose chief occupation or business is farming. Judge Bradford said (p. 358): "A person engaged chiefly in farming is one whose chief occupation or business is farming. The chief occupation of one, so far as worldly pursuits are concerned, is that which is of principal concern to him, of some permanency in its nature, and on which he chiefly relies for his livelihood or as the means of acquiring wealth, great or small. That one may devote his physical exertions or his time to a given pursuit, while one of the factors entitled to consideration, is not in all cases determinative of the question whether that pursuit is his chief occupation or business. One may own, reside on and operate a farm and at the same time be engaged in the business of buying and selling stocks and other securities. The latter occupation may consume only an hour or two and the balance of the day be devoted by him to his farm, yet it does not follow that his chief occupation or business is not dealing in stocks or other securities. If such dealing is of principal concern to him and chiefly relied on by him for his subsistence and financial advancement, and if he treats it as of paramount importance to his welfare, he would not be within the category of persons chiefly engaged in farming, even were his farm to yield him some profit." In United States v.

[3] 9 Wheat. 1.

[4] 110 Fed. Rep. 355.

Alexander,[5] Section 1956 of the Revised Statutes of the United States, prohibited the killing of fur-bearing animals within the limits of Alaska territory "or the waters thereof," and provided that any vessel "engaged in violating this section" shall be forfeited. The Alexander was equipped for hunting sea otter and had killed nine sea otters and one fur seal. Much argument took place as to the times and places of the killing, but the court took the broad view, holding that a vessel in those waters, so equipped, whether killing otters or not, was *engaged in* violating the section. Judge Truitt said (pp. 917, 918): "A view of the case so narrow and technical would, in effect, make the statute a dead letter. It says in defining the penalty so far as it relates to vessels: 'All vessels, their tackle, apparel, furniture and cargo, found in violation of this section, shall be forfeited.' Now, the question upon which this case turns is whether The Alexander was 'engaged in violation' of this statute or not. Webster defines 'engage' as: 'To embark; to take a part; to devote attention and effort.' It is admitted that The Alexander was engaged in sea otter hunting. That was her business on the cruise. These animals are not usually killed from the deck of a schooner. To successfully hunt them it is necessary to send out the hunters in small boats or bidarkas, the latter always being used by the Aleuts. I think, where a vessel is out on a hunting voyage, her master, officers and crews, or hunters on board, are all to be considered as engaged in a common enterprise or business, and every necessary action for the effectuation of the common purpose constitutes an essential part of the *res gestæ* of any violation of law committed by any one of the party, and the vessel must be held responsible for such violation." In United States v. Rennecke,[6] the defendants were charged with violating section 3242 of the revised statutes, which prohibited anyone to engage in the business of selling liquors without paying a tax. In charging the jury, Judge Simonton said: "The question you must answer by your verdict is, did they carry on the business of retail liquor dealers? * * * In answering this question regard must be had to the circumstances attending the sale. If the sale was under such circumstances as indicated that the defendants had the liquor on hand to be sold to any one who applied for it, then they may be said to have been *engaged in* the business, although but one act of selling has been proved. On the other hand, if they permitted a neighbor or friend to have a part of the supply of whisky which they had on hand for their own use, and did this in a spirit of accommodation, they could not be said to be *engaged in* the business, even if they received money for this accommodation."[7] In Roberts v. State,[8] the act of the legislature of the state of Florida (Laws of Florida, Act of June 13, 1877), required dealers who carry on and conduct the business of selling liquors to pay a license. It was charged that the defendant "did, on," etc., "then and there engage in and manage the business of a dealer in spirituous, vinous, and malt liquors, etc." This charge was held sufficient under the law. Judge Mitchell, speaking for the Supreme Court of Florida, said: "The language used in the indictment is not identical with the words of the statute, but the words used in the indictment are equivalent to those used in the statute. 'To engage,' means 'to embark; to take a part; to employ one's self; to devote attention and effort; to enlist.'[9] 'To manage,' is defined by Webster to be 'to have under control and direction; to conduct; to guide; to administer, to treat; to handle.' These definitions of the words used in the indictment substantially mean the same thing as the words 'carry on' and 'conduct' used in the statute." In Gillman v. State,[10] it was held that a statute imposing a license tax on any person engaged in or carrying on the business of keeping a theater, meant the actual use or management of a theater. In Carpenter v. Dennis,[11] it was held that a complaint in a slander suit, alleging that plaintiff is *engaged in* the woodenware business, means that he is a buyer and seller of woodenware, and not that he is only a turner of wooden bowls. In Beickler v. Guenther,[12] the law provided that no contract of a minor could be disaffirmed where, by reason of the minor's having en-

[5] 60 Fed. Rep. 914.
[6] 28 Fed. Rep. 847.
[7] United States v. Jackson, 1 Hughes, 532.
[8] 7 So. Rep. 861.
[9] Webst. Dict.
[10] 55 Ala. 248.
[11] 5 N. Y. Sup. Ct., 3 Sandf. 305, 306.
[12] 121 Iowa, 419, 96 N. W. Rep. 895, 896.

gaged in business as an adult, the other party had good reason to believe him capable of contracting. In construing the words *engaged in*, the court said: "But to 'engage in business' is uniformly construed as signifying to follow that employment or occupation which occupied the time, attention and labor for the purpose of a livelihood or profit.[13] The definition of 'business' given by Webster is quite generally accepted: 'That which engages the time, attention, or labor of any one as his principal concern or interest, whether for a longer or shorter time; constant employment; regular occupation.' The kind of employment is immaterial under our statute. It may be any particular occupation in which the minor engages as an employment. The transaction of business occasionally would be in one sense 'engaging in business,' but the statute evidently contemplates doing so as a regular occupation or employment."[14] In Guiltinan v. Metropolitan Life Ins. Co.,[15] an applicant for life insurance in his application stated that he had never been engaged in either the manufacture or sale of any kind of alcoholic beverages. It appeared that the applicant had served liquor to guests of a hotel in which he was employed. Judge Tyler, speaking for the Supreme Court of Vermont, said: "The word 'engaged,' as used in the application, means 'occupied,' and does not relate to an occasional act outside of a regular employment and the obvious purpose of the question was that the defendant might be informed whether or not this was the applicant's occupation. The defendant could have no interest to ascertain whether the applicant, as a servant of the hotel, was occasionally called upon to furnish liquor to a guest." In Inyo County v. Erro,[16] an ordinance was passed requiring the procurement of a license by "every person engaged in the business of raising, grazing, herding or pasturing sheep in the county." The case turned on the construction to be given to the words "engaged in." The Supreme Court of California said: "It is difficult to conceive of one being engaged in a business who does not transact and carry it on, and it is equally difficult to picture one transacting and carrying on a business who is not engaged in it" In Philadelphia Traction Co. v. Osbann,[17] it was held that a newsboy engaged in selling papers, and permitted to pass in and out of the cars of a passenger railway company on such business is not "engaged and employed on or about the roads, depot, premises, or cars of a railroad company," within the meaning of the Act of April 4, 1868 (8 L. 58), providing that any person thus engaged or employed (not being a passenger or employee), shall only have a right of action against the company for personal injuries as would exist if such person were an employee.[18]

Both the title of the act and the first section thereof settle beyond debate that the sole test which brings the carriers within the provisions of the law is, that the carriers shall be *engaged in* commerce between the several states. Practically all railroad and telegraph companies are *engaged in* commerce between the several states, and in order to wrest the whole field of railway transportation and telegraphic communication, and all other business conducted by common carriers and all of the officers, agents and employees of such companies from the control of the states into the hands of the federal government, the congress, without any attempt to limit the provisions of the act to interstate shipments, or interstate messages, or interstate transactions, deliberately used the most general and comprehensive language conceivable, and made the liability of common carriers dependent upon the business which they were organized to conduct and upon which they were embarked, *i. e.*, commerce between the several states. It follows, that if a railway company operates a single interstate train each day, that carrier is *engaged in* commerce between the several states, and all of its officers, agents, and employees, howsoever they may be employed, and all of its cars, engines, appliances, machinery, track, roadbed, ways or works, howsoever they may be used, are within the provisions of the law, and as to that carrier there are no states. So, also, if

[13] Abel v. State, 90 Ala. 631, 8 So. Rep. 760; Shryock v. Latimer, 57 Tex. 674; Hickey v. Thompson, 52 Ark. 234, 12 S. W. Rep. 475. See authorities collected in 6 Cyc. 259.

[14] See Stephenson v. Primrose, 33 Am. Dec. 281.

[15] 69 Vt. 469, 38 Atl. Rep. 315-316.

[16] 119 Cal. 119, 51 Pac. Rep. 32, 33.

[17] 119 Pa. St. 337, 12 Atl. Rep. 816.

[18] Authorities on this subject could be extended if it were deemed necessary to extend them. See 3 Words & Phrases Judicially Defined, 2392, 2393, 2394.

an express company transmits interstate packages, that carrier is *engaged in* commerce between the several states, and all of its officers, agents and employees, howsoever they may be employed, and all of its appliances, machinery, ways or works, howsoever they may be used, are within the provisions of the law, and as to that carrier there are no states.

A consideration of the whole act confirms what was the deliberate intent of congress. The second and third sections use the words "any common carrier," and "any employee." There is no limitation of the provisions of the act to a carrier *when* handling an interstate train; or *when* transmitting an interstate message; nor to an employee *when* operating an interstate train; or *when* conducting an interstate transaction; or *when* transmitting an interstate message. But, once the status of the carrier is fixed as a carrier *engaged in* commerce between the several states, its liability is complete, not only to those who are directly connected with that commerce between the several states, but to *any* employee. Nor is the liability confined to defects or insufficiencies in any of the instrumentalities named *when* a commerce between the several states is being conducted by a carrier, but it extends to "any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works," at all times and under all circumstances. Again, the same intent is expressed through the use of the words "*any* of its officers, agents or employees." When a carrier is embarked in commerce between the several states its officers and employees all come within the provisions of the act. All of the carriers engaged in commerce between the several states maintain general offices for the purpose of carrying on the commerce. If the president of the carrier engaged in commerce between the several states should carelessly injure an office boy in the general office, such carrier engaged in commerce between the several states becomes liable to such boy under the provisions of the act, which is without limitation. Again, a defect in the stairway of the general offices of a carrier engaged in commerce between the several states is as much within the provisions of the act as is a broken driver on a locomotive crossing a state line. A machinist repairing a tool at the carrier's shop or an office boy pressing a letter in the office of the treasurer of the carrier are as much within the provisions of the act as is a fireman on a locomotive in an interstate train, for in each case the carrier is *engaged in* commerce between the several states and the act is without limitation.

That congress intended that this act should apply to all carriers embarked in commerce between the several states, irrespective of the particular transaction at the time the accident occurred, is apparent from the wording of other statutes regulating commerce between the several states, wherein the same words are used. Thus "An act to regulate commerce," familiarly known as the Hepburn Act, approved June 29, 1906, provides, "that the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil;" and "to any common carrier or carriers engaged in the transportation of passengers or property from one state or territory of the United States * * * to any other state or territory of the United States." These provisions are substantially similar to those in the Employers' Liability Act, but in the Hepburn Act the congress inserted this proviso: "Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to receiving, delivering, storage, or handling of property wholly within one state and not shipped to or from a foreign country from or to any state or territory, as aforesaid." It is a matter of universal knowledge that the Hepburn bill was perhaps the most thoroughly considered legislation that has ever passed the congress. The ablest minds of this country debated it, word by word, and no clause was inserted except for reason. The insertion, then, of the proviso in the Hepburn Act and its absence in the act under discussion clearly indicated an intention to carry employer's liability beyond interstate commerce and affect all commerce, without regard to the rights of the states. Again, "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and other locomotives with driving

wheel brakes, and for other purposes," familiarly known as the Safety Appliance Act, approved March 2, 1893, provides that "it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engaged in interstate traffic not equipped with a power driving wheel brake and appliances for operating the train brake system," etc. Here again are words of limitation, for the words of the act are specifically limited to "any engine in interstate traffic," and in the following sections to "any car used in moving interstate traffic," and "any car in interstate commerce."

It is clear that the words "engaged in" do not mean a single transaction, but place all carriers which have embarked upon interstate trade subject to the provisions of the act. The carriers in this clause are subject not only to such of their employees as contribute directly to that particular commerce, but to "any employee." The second and third sections do not even require that the common carriers have the status of an interstate carrier, but *any* carrier is sufficient. Finally, in all other legislation of the same nature, congress has with great particularity restricted the effect of its statutes to interstate commerce. The Employers' Liability Act affects all commerce, interstate and intrastate.

The constitution provides that congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The constitution further provides that the congress shall have the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." It is from these clauses, and these clauses alone, that congress derived the power, if it has the power, to enact the law. The tenth amendment to the constitution provides that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." In the light of these grants of power to the general government, and the reservation of powers to the states, is this act a lawful exercise of the power of congress to regulate commerce among the several states? This is the great and important question to be considered, and it is to that question alone that this argument is confined.

That the power of congress to regulate commerce among the several states is plenary is of course settled. That congress has no power to regulate commerce conducted wholly within a state is equally well settled, for that power was never surrendered to the federal government. That the power of the state to regulate commerce conducted wholly within a state is as complete in the states as the power of congress to regulate commerce among the several states is complete in congress is certain, if anything can be certain. In Gibbons v. Ogden,[19] Mr. Chief Justice Marshall, when considering the clause conferring upon congress the power to regulate commerce among the several states, said: "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself." In Telegraph Co. v. Texas,[20] Mr. Chief Justice Waite, in delivering the opinion and judgment of the Supreme Court of the United States, said (p. 466): "The rule that the regulation of commerce which is confined exclusively within the jurisdiction and territory of a state, and does not affect other nations or states or the Indian tribes, that is to say, the purely internal commerce of a state, belongs exclusively to the state, is as well settled as that the regulation of commerce which does affect other nations or states or the Indian tribes belongs to congress." In Wabash Railway Co. v. Illinois,[21] Mr. Justice Miller, when construing an act of the legislature of the State of Illinois, entitled, "An act to prevent unjust discrimination and extortion in the rates to be charged by the different railroads in the state for the transportation of freight on said roads," approved April 7, 1871, said (564-5): "If the Illi-

[19] 9 Wheat. 1, 195.
[20] 105 U. S. 460.
[21] 118 U. S. 557.

nois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the state, disconnected from a continuous transportation through or into other states, there does not seem to be any difficulty in holding it to be valid. For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago or from Chicago to Alton. The charges for these might be within the competency of the Illinois legislature to regulate. The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the state, and is not commerce among the states, or interstate commerce, but is exclusively commerce within the state. So far, therefore, as this class of transportation as an element of commerce is affected by the statute under consideration, it is not subject to the constitutional provision concerning commerce among the states. It has often been held in this court, and there can be no doubt about it, that there is a commerce wholly within the state which is not subject to the constitutional provision, and the distinction between commerce among the states and the other class of commerce between the citizens of a single state, and conducted within its limits exclusively, is one which has been fully recognized in this court, although it may not be always easy, where the lines of these classes approach each other, to distinguish between the one and the other.[22] In Sands v. Manistee River Imp. Co.,[23] Mr. Justice Field, delivering the opinion and judgment of the Supreme Court of the United States, said (p. 295): "The Manistee river is wholly within the limits of Michigan. The state, therefore, can authorize any improvements which in its judgment will enhance its value as a means of transportation from one part of the state to any other. The internal commerce of a state—that is, the commerce which is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the general government."

By the use of the words "every common carrier *engaged in* commerce between the several states," the congress extended the provisions of the law over the entire field of commerce, and embraced within them all railway companies, all telegraph companies, all express companies, all electric railway companies crossing state lines, and all other companies embarked upon a commerce between the states, regardless of how little or how much. The additional words in Section 2, "any common carriers," renders the intent of congress doubly clear. By the use of the words, "any of its employees," and "any employee," the congress extended the provisions of the law over *all* of the employees of the companies conducting practically the entire commerce of the United States, numbering one and one-half millions in railroads alone. By the use of the words, "cars, engines, appliances, machinery, track, roadbed, ways or works," the congress extended the provisions of the law over all of the instrumentalities of the companies conducting that commerce. The general and sweeping terms, "every common carrier," "any of its employees," "any of its officers, agents or employees," all instrumentalities, "any common carrier," and "any employee," establish the proposition that there was but one idea in the mind of the congress, namely, that as to commerce there shall be no states. The published debates on this act in the congress also show conclusively that such was the object sought to be accomplished. Yet the judicial department has been declaring for one hundred years that the power to regulate commerce wholly within a state was a power which the states never surrendered to the federal government and, as the congess well knew, much of the commerce of common carriers is wholly carried on within the states. The words of Mr. Chief Justice Marshall, in Gibbons v. Ogden,[24] are unmistakable, viz: "The completely internal commerce of a state then, may be considered as reserved for the state itself." In United States v. E. C. Knight Company,[25] Mr. Chief Justice Fuller said: "It is vital that the independence of the commercial power and of the police power and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while one furnishes the strongest bond of union, the other is essential to the preservation of

[22] The Daniel Ball, 10 Wall. 557; Hall v. De Cuir, 95 U. S. 485; Telegraph Co. v. Texas, 105 U. S. 460.
[23] 123 U. S. 288.
[24] 9 Wheat. 1, 195.
[25] 156 U. S. 1.

the autonomy of the states as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run in the effort to suppress them of more serious consequences by resort to expedients of even doubtful constitutionality." In no statute has congress undertaken so far to invade the rights of the sovereign and independent states as in the Employer's Liability Act.

In Northern Securities Company v. United States,[26] Mr. Justice Harlan said: "If the statute is beyond the constitutional power of congress, the court would fail in the performance of a solemn duty if it did not so declare." As the act now stands, the clear intent of congress will allow no separation of interstate commerce from purely intra-state commerce and the rights and liabilities of persons not conducting any commerce. Since the congress has no power over the latter subjects, the whole act must fall.

In the foregoing we have sought to point out that the act in question is unconstitutional upon the single proposition that congress has undertaken therein to invade the rights of the states. Lack of space prevents us from discussing other features of constitutionality. The power granted to congress to regulate commerce with foreign nations and among the several states and with the Indian tribes, is a power over the subject-matter, to-wit: the regulation of commerce. Because a person or corporation is engaged in such commerce it by no means follows that congress has the power to regulate the acts and doings of such person or corporation in matters which in no way pertain to interstate commerce.

GARRARD B. WINSTON,
BLACKBURN ESTERLINE.

Chicago, Ill.

[26] 193 U. S. 350.

ASSIGNMENT—WAGES TO BE EARNED.

RODIJKEIT v. ANDREWS.

Supreme Court of Ohio, April 3, 1906.

An assignment of wages to be earned in the future under an existing employment is valid.

The plaintiff in error assigned his wages to the defendant in error. A copy of the assignment is as follows: "$75.00. Toledo, Ohio, April 22, 1904. To the Paymaster, L. S. & M. S. R. R.—Dear Sir: For value received, I hereby assign seventy-five 00-100 dollars from the amount now due me, or which may hereafter become due me for services rendered the L. S. & M. S. R. R. or any other railway, firm or person wherever I may be employed as switchman, and you are hereby authorized to pay the above amount to P. L. Andrews, or his order, and deduct the same in settlement with me. No. ——. (Signed) T. Rodijkeit." In February, 1905, Rodijkeit sued the railroad company before a justice of the peace for $51.20 for wages. The railroad company filed an affidavit for interpleader, asking that the defendant and one Ida E. Chandler be made parties, which was allowed and it paid the sum sued for into court. The justice ordered the fund to be distributed as follows: (1) The costs; (2) $45.60 to Andrews, and the remainder to be held subject to the justice's order in the case of Chandler against said Rodijkeit. Ida E. Chandler appealed the case. In the court of common pleas Andrews in his answer averred that "on the 22d day of April, 1904, the said plaintiff was in the employ of said defendant, the Lake Shore & Michigan Southern Railroad Company, and so remained in the employ of said defendant continually up to the 25th day of January, 1905; that on the 22d day of April, 1904, said plaintiff, for a valuable consideration, assigned to defendant, P. L. Andrews, out of the wages then due or to become due him from said defendant company, the sum of $75, and that there is now due this answering defendant on said assignment, a copy of which is hereto attached and marked 'Exhibit A' and made a part thereof, the sum of $45.60." A general demurrer to this answer, after it had been amended by setting forth in full the assignment, was sustained and the answer dismissed at the cost of Andrews. In the circuit court the judgment was reversed and the case remanded, with instructions to overrule the demurrer and for further proceedings according to law. Error is prosecuted to this court to reverse the judgment of the circuit court and to affirm that of the court of common pleas.

SUMMERS, J. (after stating the facts): Two of the questions argued by plaintiff in error, namely, that the assignment, not having been accepted by the debtor, was not effective against the attaching creditor, Ida E. Chandler, and that the assignment, being of a part only of a chose in action, is not enforceable against the debtor, are not presented by the record; the first because Ida E. Chandler is not a party to the proceeding in error, and the second because the railroad company did not refuse payment. The question presented is the right of a person in the employ of another, in the absence of a contract for a definite time of employment, to assign future earnings from such employment. It is well settled that a mere expectancy or possibility is not assignable at law, consequently wages to be earned in the future, not under an existing engagement but under engagements subsequently to be made, are not assignable. If there is an existing employment,

under which it may reasonably be expected that the wages assigned will be earned, then the possibility is coupled with an interest and the wages may be assigned. Mallin v. Wenham, 209 Ill. 252, 70 N. E. Rep. 564, 65 L. R. A. 602, 101 Am. St. Rep. 233; Metcalf v. Kincaid, 87 Iowa, 443, 54 N. W. Rep. 867, 43 Am. St. Rep. 391; Peterson v. Ball, 121 Iowa, 544, 97 N. W. Rep. 79; Bell v. Mulholland, 90 Mo. App. 612; Manly v. Bitzer, 91 Ky. 596, 16 S. W. Rep. 464, 34 Am. St. Rep. 242; Schilling v. Mullen, 55 Minn. 122, 56 N. W. Rep. 586, 43 Am. St. Rep. 475; Augur v. N. Y. B. & P. Co., 39 Conn. 536; Garland v. Harrington, 51 N. H. 409; Mulhall v. Quinn, 1 Gray (Mass.), 105, 61 Am. Dec. 414; Hartey v. Tapley, 2 Gray (Mass.), 565; Brackett v. Blake, 7 Metc. (Mass.) 335, 41 Am. Dec. 442; Low v. Pew, 108 Mass. 347, 11 Am. Rep. 357; Lightbody v. Smith, 125 Mass. 51; O'Keefe v. Allen, 20 R. I. 414, 39 Atl. Rep. 752, 78 Am. St. Rep. 884; Dolan v. Hughes, 20 R. I. 513, 40 Atl. Rep. 344, 40 L. R. A. 735; Thayer v. Kelley, 28 Vt. 19, 65 Am. Dec. 220.

Some of the early cases were to the effect that the engagement must be for a time covering the wages assigned. Mulhall v. Quinn, 1 Gray (Mass.), 105. 61 Am. Dec. 414; Hartey v. Tapley, 2 Gray (Mass.), 565; Taylor v. Lynch, 5 Gray (Mass.), 49; Lannan v. Smith, 7 Gray (Mass.), 150. And later cases held that the assignment was valid although the engagement was subject to be terminated at any time. But in Kane v. Clough, 36 Mich. 436, 24 Am. Rep. 599, Cooley, C. J., states that he is unable to distinguish a case of existing employment merely, where there is no contract for a definite time, but only an employment, and an expectation of continuous work, from a case of an existing contract for a fixed time but subject to the right to discharge at will, and, accordingly, it is there ruled that an assignment of wages to be earned in the future under an existing employment is valid. "An assignment of wages to be earned in the future under an existing employment, even though the employment is for an indefinite time, is not against public policy, and is valid if made for a valuable consideration and untainted with fraud." Mallin v. Wenham, 209 Ill. 252, 70 N. E. Rep. 564, 65 L. R. A. 602, 101 Am. St. Rep. 233. "An assignment of wages yet to be earned is good as against the claims of attaching creditors, if accepted, and if, at the time it is made, there is an existing engagement or employment by virtue of which wages are being, and in the future may reasonably be expected to be earned, even though there is no contract or fixed time of employment." Metcalf v. Kincaid, 87 Iowa, 443, 54 N. W. Rep. 867, 43 Am. St. Rep. 391. "An assignment of wages to be earned, made in good faith and for a valuable consideration, is valid. And it makes no difference that the work is being done without a special contract as to it but only upon an understanding that the employee should continue in the service of the employer as before, at the usual wages and in the ordinary course of employment." Augur v. N. Y. B. & P. Co., 39 Conn. 536. "The fact that a contract of employment is silent as to the time of its termination, does not affect the right of the employee to assign his wages arising under the contract. If the hiring be by the day it is not necessarily for a single day, but is a continuous hiring by the day so long as the contract continues." Dolan v. Hughes, 20 R. I. 513, 40 Atl. Rep. 344, 40 L. R. A. 735. "A person in the actual employment of another, from whom he is receiving wages at a stipulated rate, may make a valid assignment of his future earnings, although the employment is for no definite period, and may be terminated at any time by either party." Thayer v. Kelley, 28 Vt. 19, 65 Am. Dec. 220. "An assignment of prospective wages to be earned under an existing employment of either certain or uncertain duration, if made in good faith for a valuable consideration, is upheld by the courts, whether intended as a security for present or future advances, or as an outright sale. But if the assignor has no employment at the date of the assignment, which is executed in contemplation of the possible future employment it may attach to, the contract is invalid." Bell v. Mulholland, 90 Mo. App. 612. "Future wages, to be earned under a present contract imparting to them a potential existence, may be assigned, although the contract may be indefinite as to time and amount, unless affected by the statute requiring registration." Wade v. Bessey, 76 Me. 413. "When a party has entered into a contract or arrangement, by the ordinary and legitimate and natural operation of which he will acquire property, his existing right thereunder is not a mere naked hope; it is a possibility of acquiring property coupled with a legal interest in the contract. The cargo to be obtained or the freight to be earned by a ship on a voyage already contracted for, the wages to be earned under an existing employment, the payment to become due under an existing building contract, are familiar examples." Pomeroy, Equity Jurisprudence, § 1286. "An assignment of his wages by a laborer, executed when he is not engaged in, and not under contract for, the employment in which the wages are to be earned, is too vague and uncertain to be sustained as a valid assignment and transfer of property." Lehigh V. R. Co. v. Woodring, 116 Pa. 513, 9 Atl. Rep. 58. But "an assignment of wages expected to be earned in the future in a specified employment, though not under an existing employment or contract, is valid in equity." Edwards v. Peterson, 80 Me. 367, 14 Atl. Rep. 936, 6 Am. St. Rep. 207. The reason such an assignment is not good at law, but may be in equity, is tersely stated thus: "To make a grant or assignment valid at law, the thing which is the subject of it must have an existence, actual or potential, at the time of such grant or assignment. But courts of equity support assignments not only of choses in action, but of contingent interests and expectations, and also of things which have no present actual or potential existence, but rest in mere possibility only."

Smithhurst v. Edmunds, 14 N. J. Eq. 416. "The invalidity of a grant at law of a mere expectancy imports no more than that it is ineffectual to pass the legal title. Equity construes the instrument as imposing a lien upon the *res* when produced or required, leaving the legal title still in the grantor, who may by some act ratify the same, as by delivery of the property, and then the legal title is complete in the vendee." Everman v. Robb, 52 Miss. 653, 24 Am. Rep. 682. "The reason that it may be different in equity is not that a man conveys *in presenti* what does not exist, but that what is in form a conveyance operates in equity by way of present contract merely, to take effect and attach to the things assigned as soon as they come *in esse;* to be regarded before that time only as an agreement to convey, and after that time as a conveyance." Peters, J., in Emerson v. E. & N. Ry. Co., 67 Me. 387, 391, 24 Am. Rep. 39.

The case of Lehigh V. R. Co. v. Woodring, *supra*, is principally relied upon by plaintiff in error. But that case is not an authority against the conclusion reached in the present case, but rather supports it, for it impliedly admits that an assignment of future wages under an existing employment is valid, which is the fact in the case under consideration, and it then holds that an assignment of wages to be earned in the future and not under an existing contract, is invalid, with which question we are not at present concerned. It is true that the judge of the lower court in that case in his opinion says that all such assignments should be declared void as being against public policy, and, further, "should the law be declared to be that such an assignment is valid, it is not difficult to see that it would open the door to improvidence and profusion on the part of the assignor, and in the end to utter and hopeless poverty. Take the case of any wage earner or salary earner, or any one who is compelled to work for a living, for in either case the principle is the same. He conceives himself to be in want of money, whether for necessaries or luxuries makes no difference. He finds that he can raise the coveted money by assigning his future earnings to become due from any and every source. No purchaser offers for his wages in any existing employment, for he may quit that employment at any time and thus render worthless his assignee's security. He therefore, under the pressure of his supposed wants, pledges his whole money-earning power for a price. Presently the money or provisions, or what not, thus acquired, are all gone. They may have been recklessly squandered; they may have been doled out only for the very necessaries of life, during a period of sickness or other misfortune; it's all the same. He is not only penniless, but he has incurred a debt which it may require months, and even years to work off. Turn where he will, go where he will, his creditors may follow him and sweep away every dollar of his earnings until his debt is paid. In the meantime his children are clamoring for bread."

These reasons are very like those which are said by Denman, J., in Hale v. Hollon, 90 Tex. 427-30, 39 S. W. Rep. 287, 36 L. R. A. 75, 59 Am. St. Rep. 819, to have led the courts of equity to refuse to enforce a sale of a mere expectancy of inheritance unless it was shown that the transaction was free from fraud. But the judge in the Pennsylvania case, *supra*, even in what is said respecting public policy, had reference to an assignment of all wages, past and future, so long as the assignee's claim remained unpaid, which is not the present case. But it is said that in 1905, the year following the decision in Mallin v. Wenham, *supra*, the legislature of Illinois passed an act in relation to the assignment of wages, the fourth section of which provided that "every assignment of wages to be earned in whole or in part more than six months from and after the making of such assignment shall be absolutely void." This, however, does not tend to discredit the correctness of the conclusion reached, but only to show that in the opinion of the legislature there was need of legislation. In Smith v. Atkins, 18 Vt. 461, it is held that "a lease of land, reserving rent, and which provides that all the crops raised on the land during the term are to be the property of the lessor until rent is paid, is valid." And in the opinion Redfield, J., says: "It is argued that such contracts are so much against public policy that they ought not to be supported. But we think they are rather beneficial and enable the poor man to obtain credit and the use of land, when he could not otherwise do it, and that without detriment to the creditors. And we do not perceive how this will enable him to deceive any one, as the nature of his property may be as well ascertained in such case as in any other. So far as there is any principle of policy involved in questions of property, it is supposed to have reference to the security of property and credit to those who most stand in need of such protection, who are not generally of the same class of persons. The rule here adopted, we think, secures both far better than the opposite rule could." The case immediately preceding was cited with approval on the question of public policy in the case of Edwards v. Peterson, 80 Me. 367, 14 Atl. Rep. 936, 6 Am. St. Rep. 207. In Manly v. Bitzer, 91 Ky. 596, 598, 16 S. W. Rep. 464, 34 Am. St. Rep. 242, Chief Justice Holt says: "Looking at the question from the standpoint of public policy, there are two views presented, which, perhaps, balance each other. If the wage earner in a case like this one be permitted to sell and transfer his unearned wages, the honest creditor may sometimes be defrauded; but, upon the other hand, it may often be necessary to the subsistence of the laborer and his family, as is claimed was true in this instance."

In Godcharles v. Wigeman, 113 Pa. 431, 6 Atl. Rep. 354, the court had under consideration an act (P. L. 1881, 147, § 2) requiring persons and companies engaged in any kind of manufacturing to "settle with their employees at least once in each month and pay them the amounts due them

for their work or services in lawful money of the United States or by the cash order as described and required in section 3 of this act; provided that nothing herein contained shall affect the right of an employee to assign the whole or any part of his claim against his employer." And it is said: "The orders given by the defendants and received by the plaintiff constituted a proper set-off. The first, second, third and fourth sections of the act of June 29, 1881, are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what, in this country, cannot be done; that is, prevent persons who are *sui juris* from making their own contracts. The act is an infringement alike of the right of the employer and the employee; more than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void." Whether or not an act precluding an assignment of wages would be constitutional we are not called upon to determine, but it is worthy of note, on the question of public policy, that in the act just referred to the legislature thought it proper to safeguard the right of the employee to assign his wages.

In Brooks Co. v. Tolman, 6 Ohio Cir. Ct. Rep. (N. S.) 137, it was held that "an assignment of wages or salary to be earned under an existing employment, made in good faith, and for a valuable consideration, is valid where the relation between the employee and his employer is such that the employee may reasonably be expected to earn the wages covered by the contract, and against such a contract and claim even homestead exemption cannot prevail." That case was affirmed in 74 Ohio St. ——, 77 N. E. Rep. —. The question there presented is the same as that raised here. In each case the wages earned were earned under an engagement existing at the time the assignment was made. The assignment in each case is not limited to the wages to be earned under the existing employment, but in express terms includes those to be earned in any other employment, but the question whether the assignment would be effective as to wages earned under engagements other than the one existing is not raised, and is not considered. Brewer v. Greisheimer, 104 Ill. App. 323.

In Porter v. Dunlap, 17 Ohio St. 591, a teacher engaged in teaching assigned a specific amount of his wages, earned and unearned, and it was ruled that the assignment was good in equity. The question whether it was good at law does not seem to have been presented, and was not considered.

Affirmed.

NOTE.—*Assignment of Wages to be Earned in the Future, in the Absence of a Contract of Employment for Stipulated Wages and for a Stipulated Period of Time.*—The rule laid down by the court is expressed in the following paragraph: "The question presented is the right of a person in the employment of another, in the absence of a contract for a definite time of employment, to assign future earnings from such employment. It is well settled that a mere expectancy or possibility is not assignable at law. Consequently, wages to be earned in the future, not under an existing engagement, but under engagements subsequently to be made, are not assignable. If there is an existing employment, under which it may reasonably be expected that the wages assigned will be earned, then the possibility is coupled with an interest, and the wages may be assigned."

The only decision of the Supreme Court of Ohio previous to the Rodijkeit case, bearing on the question, is found in Grant v. Ludlow, 8 Ohio St. 38, par. 6, where the following rule is laid down: "Whatever choses in action are transmissible by operation of law are assignable in equity. The rule stated by Story, J., in Comegys v. Bassee, 1 Pet. 213, is undoubtedly correct, and has been acted upon in the State of New York in determining what assignees may sue as plaintiffs under their code. 'In general it may be affirmed that mere personal torts which die with the party and do not survive to his personal representatives, are not capable of passing by assignment,' and that vested rights, *ad rem* and *in re* possibilities, coupled with an interest and claims growing out of and adhering to property, may pass by assignment." Robinson v. Weeks, 6 How. 161; Hall v. Robinson, 2 Const. 294: Hoyt v. Thompson, 1 Seld. 347. The rule laid down in 8 Ohio St. is consistent with the old established authorities on the question as to what property and rights are assignable at law. Mitchell v. Winslow, 2 Story, 639; Low v. Pew, 108 Mass. 349.

While the court has Illinois, Iowa and Michigan decisions of comparatively recent date to substantiate its position, it would seem, nevertheless, that the rule laid down by the court is illogical in the first place, and incompatible with the old and long established rules of law which determine what rights and property are assignable or may be sold at law. The leading case on this question, Low v. Pew, 108 Mass. 347, and Williston's Selected Cases on Sales, p. 2, lays down the rule: "It is equally well settled that it is sufficient if the seller has a potential interest in the thing sold, but a mere possibility or expectancy of acquiring property, not coupled with any interest, does not constitute a potential interest in it, within the meaning of this rule. The seller must have a present interest in the property of which the thing sold is the product, growth or increase. Having such interest, the right to the thing sold and the sale of it is valid. Thus, a man may sell the wool to grow upon his own sheep, but not upon the sheep of another; or the crops to grow upon his own land, but not upon the land in which he has no interest." 2 Kent, Com. (10th Ed.) 468; Jones v. Richardson, 10 Metc. 481; Bellows v. Wells, 36 Vt. 599; Van Hoozer v. Cory, 34 Barb. 9; Grantham v. Hawley, Hob. 132. The same principles have been applied by this court to the assignment of future wages or earnings in Mulhall v. Quinn, 1 Gray, 105; an assignment of future wages, there being no contract of service, was held invalid. In Hartey v. Tapley, 2 Gray, 565, it was held that if a person is under a contract of service he may assign his future earnings growing out of such contract. The distinction between the cases is, that in the former the future

earnings are a mere possibility, coupled with no interest, while in the latter the possibility of future earnings is coupled with an interest, and the right to have, though contingent and liable to be defeated, is a vested right. In the principal case the sellers at the time of the sale had no interest in the thing sold. There was a possibility that they might catch halibut, but it was a mere possibility and expectancy, coupled with no interest. We are of the opinion that they had no actual or potential possession of or interest in the fish, and the sale to the plaintiffs was void. The plaintiffs relied upon Gardner v. Hoeg, 18 Pick. 168, and Tripp v. Brownell, 12 Cush. 376. In both of these cases it was held that the lay or share in the profits which a seaman in a whaling voyage agreed to receive in lieu of wages was assignable. The assignment in each case was not of any part of the oil to be made, but of the debt which under the shipping articles would become due to the seaman from the owners at the end of the voyage. The court treated them as cases of assignments of choses in action. The question upon which the principal case turns did not arise and was not considered.

It is contended in the principal case that the mere allegations of an "existing employment under which it may reasonably be expected that the wages to be assigned will be earned," is not such an interest, vested or otherwise, as is contemplated by the law as laid down in Low v. Pew, 108 Mass. 247, and Grant v. Ludlow, 8 Ohio St. 38, as will connect the possibility that Rodijkeit might earn wages the following January with an interest, thereby giving him the right to sell the same the preceding April, unless he were under a contract of employment covering the entire period within which the wages attempted to be assigned could be earned. The court admits that if Rodijkeit was not employed at the time the assignment was executed, then the possibility of his earning wages in the future was not coupled by an interest such as is contemplated by the law in Grant v. Ludlow and Low v. Pew. Moreover, inasmuch as the general condition of laborers is to be engaged in earning wages, the mere fact that a laborer is employed at will does not strengthen the possibility of earning wages nine months in the future any more than if he were not so engaged. But if he has a contract of employment for a fixed time or an indefinite period for stipulated wages, such that in the case of a breach of the contract, an action for damages would lie then and then only, is the possibility of earning wages in the future coupled with such an interest as is contemplated by the law in Grant v. Ludlow, Low v. Pew and Belding v. Read, 3 Hurl., and Coltman's Reporter, 961.

It should be further remarked that Low v. Pew, Lightbody v. Smith, Brackett v. Blake and Hartey v. Tapley, cited by the court, do not support the rule laid down by the Supreme Court of Ohio. On the contrary the court say in Lightbody v. Smith, 125 Mass. 51: "It may have been the expectation of all the parties concerned at the time the advances were made to Lightbody that he would continue in the employ of the defendants long enough for his wages to repay those advances, but there was no stipulation to that effect. On the contrary, his employment was by the day and from day to day only. They had a right to discharge him at any moment, and he had a right to seek employment elsewhere whenever he saw fit. Except as to wages actually due him at the time of the assignment it was an attempt to transfer a mere possibility of future earnings, and not an existing chose in action." Mulhall v. Quinn, 1 Gray, 105; Twiss v. Cheever, 2 Allen, 40; Brackett v. Blake, 7 Metc. 335; Low v. Pew, 108 Mass. 347, 350.

It was admitted by the assignment that Rodijkeit had contracted to pay Andrews $75, but the real question before the court was when would the title, if at all, to wages earned by Rodijkeit at some future time (in this case January 1st to 25th, 1905) pass to Andrews. The assignee could not acquire under the assignment any greater right to the wages than Rodijkeit could have, and he could not sue on April 22nd, 1904, the date of the assignment, for wages earned during January, 1905. The assignment could not be enforced in equity, because in an employment at will the employee could quit or the employer could discharge him without creating any liability, and thus defeat any attempt of a court of equity to enforce specific performance of such a contract. Fairgraves v. The Lehigh Navigation Co., 2 Phil. (Pa.) 184-7.

Moreover, in the cases of the sales of wool to be grown on one's own sheep and of crops to be grown on one's own land, the will of no one could interfere with the maturing the fleece of wool or of the crop without creating a liability for which the one interfering with the same must answer. In order that A may assign or sell personal property he must have in him the title of the property or the title to a part of the property out of which the property attempted to be assigned or sold is the growth or increase by accumulation or addition at the time he executes his assignment or grant of the property. "It is an elementary principle of the law of sales that a man cannot grant personal property in which he has no interest or title. To be able to sell property he must have a vested right in it at the time of the sale. Thus, it has been held that a mortgage of goods which the mortgagor does not own at the time the mortgage is made, though he afterwards acquires them, is void. James v. Richardson, 10 Metc. 481. The same principle is applicable to all sales of personal property. Rice v. Stone, 1 Allen, 566, and cases cited; Head v. Goodwin, 37 Me. 181; Low v. Pew, 108 Mass. 349." Therefore, such an assignment with respect to wages to be earned in the future, is nothing more than a contract to sell the wages when they are earned, and in case of a breach of the contract an action for damages only would lie, just as in the case of a contract for the sale of property for future delivery.

In the case of Dred Scott v. Sanford, 19 How. (U. S.), the majority of the supreme court erred in passing on the property rights in slaves when held in free states in not following the rules of law established in the free and slave states, in the old English cases and those of the civil law, as laid down in the courts of continental Europe, rather than following those cases decided in slave states. So here the writer thinks that the court erred in breaking away from the old rules of law as laid down in the earlier decided cases of the United States, England and the continent of Europe, thereby establishing or tending to establish a condition of industrial slavery by establishing a rule of law whereby a man may sell for a consideration his future earnings for any number of years, to-wit, for life.

Toledo, Ohio. JAS. HARRINGTON BOYD.

[While the authorities seem to preponderate strongly in favor of the court's position in the principal case, the CENTRAL LAW JOURNAL is strongly inclined to the opinion that American courts in their characteristic efforts to encourage the free alienation of property, have departed from an ancient landmark without corresponding advantages sufficient to compensate for the violence which the introduction of this

new rule has done to the logic of the law and correct legal principle. If it is axiomatic that a man cannot sell that in which he has no present or future interest, and we think no one will controvert the statement, it does seem strange that a man can be permitted to sell wages which he has not earned and which he has not the right to earn under any existing contract. If A have a contract to sell and deliver to B for twelve months in the year ten cords of wood per month, payable monthly at $7 per cord, A can assign that contract or its proceeds for a cumulated period of twelve months. But if A's contract is merely an order for one month's supply, and B tells him to continue shipping the same number of cords per month until he countermands the order, would anyone contend that A could sell the proceeds of twelve months' business based on such a state of facts? He has nothing to sell. So, also, where a man sells his labor to another for twelve months, under a special contract to be paid for in monthly installments, he has something to sell, something to assign, even up to the value of his services for twelve months. But under such a contract would he be permitted to assign the value of his services for twenty-four months, etc.? Certainly not, even though it is probable that the contract will be renewed. A contract of that kind so clearly limits the interest of the employee to a specified date that no court would be justified in enforcing an assignment of such an employee's wages beyond the expiration of the service as fixed in the contract. Nevertheless, under the rule of law announced in the principal case, as soon as the limitation of one year has expired in the special contract and the employee continues in the employment for the same monthly consideration, but only at the will of his employer, then immediately the employee becomes invested with a greater power of disposition than he had under the special contract, and may now assign his earnings for two, three, ten, twenty or fifty years to come, and this, too, though he is only employed one month at a time.

America seems to be the only place in the world where a man can sell something he does not possess, and deal in "futures" that have no present tangible evidence of existence. A man can go on the Chicago market in September and sell one hundred million bushels of spring wheat that as yet has never been planted, and won't be reaped and garnered until the following spring, and to produce which it will take the services of a thousand farmers with whom he is in no privity of contract. This is indeed a wonderful country, a country so everlastingly buoyant with hope that it persists in cashing the imaginary returns of expected ventures to be earned by some undetermined methods for years into the future. Is it any wonder that the courts have caught the contagion and have become a party to the universal American scheme to discount the future, and is not the rule laid down in the principal case an evidence of the court's participation in this popular endeavor, especially when so great a jurist as Judge Redfield, of Vermont, in the case of Smith v. Atkins, 18 Vt. 461, says that the rule is to be upheld in order "to enable the poor man to obtain credit, when he could not otherwise do it." If courts are going to permit a man to mortgage the future and interests which have no tangible evidence of existence, our recording acts will have to be much enlarged and thoroughly revised in order to determine what previous blanket mortgages may exist on a man's undetermined and afterwards acquired possessions.

The old Massachusetts rule is the best, the most logical and most valiantly upholds the old common law landmark, from which it seems to us to have been unnecessary to have departed.—EDITOR.]

JETSAM AND FLOTSAM.

EVIDENCE OF SIMILAR CRIMES.

No rule is more characteristic of our criminal system as contrasted with continental systems than that which excludes evidence of similar offenses which have been committed by the accused, but which are unconnected with the crime with which he is charged. It is a well-established principle that evidence tending to show that the prisoner has been guilty of any crime other than that which is included in the indictment is inadmissible for the purpose of leading to the inference that the prisoner is likely, from his antecedent conduct, to have committed the criminal offense for which he is being tried. "The law of England," said Lord Campbell, "does not allow one crime to be proved in order to raise a presumption that another crime has been committed by the perpetrator of the first." R. v. Oddy, 2 Den. 264. To this general principle there are, however, certain recognized limits or exceptions which are founded on good reason and are essential to the effective administration of justice. Thus the privy council, in a leading case upon the subject, Makin v. Attorney-General for New South Wales (1894), A. C. 57, decided that the mere fact that evidence offered tends to prove the commission of other crimes does not render it inadmissible if it bears upon the question whether the acts which are alleged to constitute the crime charged were designed or accidental, and such evidence is also admissible to rebut a defense which would otherwise be open to the accused. It was held, therefore, by the privy council that on an indictment for the murder of an infant, the prosecution, in order to prove intent and to rebut the defense of accident, were entitled to give evidence showing that the prisoner had received other infants and that the bodies of infants were subsequently found buried in the prisoner's back yard.

Evidence of the commission by the accused of similar crimes has, indeed, frequently been held to be admissible in order to prove systematic conduct and to negative the suggestion of accident by the accused. Thus, in poisoning cases evidence has been admitted to show that similar poison has been previously administered by the prisoner to other persons. See R. v. Geering (1849), 18 L. J. M. C. 215; R. v. Cotton (1873), 12 Cox C. C. 400. In R. v. Rhodes (1899), 1 Q. B. 77, on an indictment for obtaining eggs by false pretenses by means of newspaper advertisements by the accused stating that he was carrying on a dairyman's business, evidence was held to be admissible to prove that subsequently to the acts in question he had obtained eggs from other persons by means of similar advertisements. In R. v. Ollis (1900), 2 Q. B. 758, the court for crown cases reserved (two of the judges, Bruce and Ridley, JJ., dissenting) decided that on an indictment for obtaining a check by the false pretense that another check given by the accused to the prosecutor which was subsequently dishonored was a good and valid order for the payment of money, evidence of acts in respect of which the prisoner had been previously acquitted was held to be admissible to prove guilty knowledge. Again, evidence of similar acts done by the accused at a period immediately preceding

the commission of the alleged offense was held admissible in R. v. Wyatt (1904), 1 K. B. 188, in which case the prisoner being indicted for obtaining credit by means of fraud in hiring furnished apartments and leaving without payment, evidence was given to show that the accused had previously gone to several other houses, hired and occupied apartments and left without paying. In cases of this type the proof of systematic fraud could frequently be established only by the admission of such evidence, and although it has been urged that of recent years the courts have shown a disposition in some cases to admit this kind of evidence too readily, its reception for the purpose of showing intent, knowledge or system, and of rebutting the defense of accident or mistake which might otherwise be raised, must be regarded as being in the best interests of justice.

This branch of the law of evidence has recently been fully discussed and many of the decisions to which we have referred have been reviewed by the court for the consideration of crown cases reserved in the case of R. v. Bond, in which judgment was delivered on the 11th of June. On the trial at Chester assizes of an indictment under section 58 of 24 and 25 Vict., ch. 100, for feloniously using instruments upon a girl in October, 1905, with intent thereby to procure a miscarriage, evidence was given that the prisoner had admitted using the instruments, but he alleged that the use was for a lawful purpose and without criminal intent. Evidence was admitted to prove that the prisoner had previously used similar instruments in January, 1905, in order to procure miscarriage on another girl who was called as a witness. It was contended by the defense that the evidence of this witness was inadmissible, there being other indictments against the prisoner for other offenses against the same statute, in respect of the acts alleged to have been done by the prisoner to the witness, and that such acts had no reference to the offense alleged in the indictment on which the prisoner was being tried. The learned judge, A. T. Lawrence, J., admitted the evidence on the authority of R. v. Geering, *supra*; R. v. Dale (1889), 16 Cox C. C. 703, and other cases. The prisoner was convicted and sentenced to three years' penal servitude, but was admitted to bail pending the decision of the case stated, which raised the question as to whether the evidence had been properly admitted.

Two of the judges of the court for the consideration of crown cases reserved, the Lord Chief Justice and Ridley, J., were of opinion that the evidence was inadmissible, and that the conviction ought to be quashed, but a majority of the judges, consisting of Kennedy, Darling, Jelf, Bray and A. T. Lawrence JJ., held that the evidence had been rightly admitted, and that the result was that the conviction was affirmed.

Lord Alverstone, C. J., in his judgment stated the general rule of law that, apart from express statutory enactments, evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment cannot be given unless the acts sought to be proved are so connected with the offense charged as to form part of the evidence by which it is proved, or are material to the question whether the acts alleged to constitute the crime were designed or accidental, or to rebut a defense which would otherwise be open to the accused. In the particular case it was not disputed that the instruments had been used by the prisoner upon the prosecutrix; the question was whether such use was, as the defense alleged, for a lawful purpose, or, as the prosecution alleged, for an unlawful purpose. The Lord Chief Justice was of opinion that the fact that the prisoner had used instruments for an unlawful purpose upon another girl some months before, had no bearing upon the purpose for which they were used on the occasion in question. There was *prima facie* no necessary connection betwen the act charged in the indictment and the act alleged in the evidence admitted, and the learned Lord Chief Justice held that there was not sufficient ground to justify the admission of the evidence as tending to establish a system or a course of conduct on the part of the prisoner. He did not decide that there might not be cases in which the evidence would have been admissible on such grounds, but in his view this case was not one of them.

On the other hand, Darling, J., in his judgment, affirming the conviction, after citing the case of Makin v. Attorney-General for New South Wales, *supra*, said that in the present case the evidence objected to was called to overthrow a defense already set up by the prisoner in answer to the charge, and the cases showed that our law does undoubtedly allow evidence of another crime in order to negative the possible defenses of accident or mistake or to show a systematic course of conduct or guilty knowledge where that is material. In the opinion of the learned judge, the evidence of the witness in question was not irrelevant or foreign to the point in issue, that issue being not what the prisoner did do, but with what object he did it. The judge further remarked that it did not appear to him advisable to strive to increase the technicality of our rules of evidence so as to narrow yet more the approaches to the source of justice, and concluded by saying he believed that to quash the conviction would necessitate the interpretation of our rules of evidence so in favor of the accused as to exclude such proof of guilty knowledge as hitherto had been admissible.

The abstract enunciation of the principles regulating the admissibility of this class of evidence presents little difficulty, but the determination whether specific evidence should be received or rejected in the particular instance is fraught sometimes with considerable difficulty, and we fear that the latest decision of the court for the consideration of crown cases reserved scarcely elucidates the subject, and will afford little assistance in fut ire cases.—*Justice of the Peace, London.*

BOOK REVIEWS.

THE GRAND JURY.

Anyone wishing to become well informed with regard to the grand jury will find in this well gotten up little work by Mr. George J. Edwards, Jr., of the Philadelphia bar just what he needs. The work was originally written with reference to the law relating to the grand jury in England, Pennsylvania and the United States courts, but has been enlarged to cover all the states. This is to be found in the preface: "While the subject of juries has received careful attention from legal writers, and within the scope of their work the law of grand juries has been considered fully, sufficient attention has not been given to the historical growth of the grand jury. In this essay the origin, history and development of the grand jury have been considered at length." The number of cases cited to support the text evidences diligence

and care in the preparation of this work, which will be found both interesting and useful to every lawyer.

It is well bound in buckram, containing 219 pages and is published by the George T. Bisel Company of Philadelphia.

HUMOR OF THE LAW.

In one of the examinations for admission to the New York bar the question was asked: "What is the essential to constitute a valid marriage in New York?" One of the aspirants answered: "The parties must be of opposite sexes."

"I delights to observe dose new laws against adulteration," remarked brother Ebenzer Jones. "Dere's a'mos' too much ob dis year thing going on. Ef a man can't keep the sebenth commandment ob de Lord, den I say let men hang him up by de neck till he stops it—dat'sall."

As a prisoner was brought before Judge Sherman for sentence the clerk happened to be absent. Judge Sherman asked the officer in charge of the prisoner what the offense was with which he was charged. "Bigotry, your honor. He's been married to three women." "Why, Officer, that's not bigotry, said the Judge, "that's trigonometry."

Arthur Evans, general counsel for Swift & Co., the meat packers, blew along Pennsylvania Avenue.

"Hi there, Arthur!" shouted a friend. "Where have you been?"

"Oh!" said Evans, "I've been down in Nashville getting indicted with the Fertilizer Trust. Got to be a habit with me now. Every town I drop into I find the hospitable citizens waiting to indict me. All the rage."

Seecretary Shaw recently told a story on Representative Smith, of Iowa, when the latter was a fledgling attorney and anxious to make a reputation for himself. A prisoner was brought before the bar in the criminal court in Iowa, but he was not represented by a lawyer.

"Where is your lawyer?" inquired the judge who presided.

"I have none," responded the prisoner.

"Why have'nt you?"

"Have'nt any money to pay a lawyer."

"Do you want a lawyer?" asked the judge.

"Yes, your honor."

"There is Mr. Walter I. Smith, John Brown, George Green," said the judge, pointing to a lot of young attorneys who were about the court waiting for something to turn up. "and Mr. Alexander is out in the corridor."

The prisoner eyed the budding attorneys in the court room, and after a critical survey stroked his chin and said, "Well, I guess I will take Mr. Alexander."

A news item in a Waterloo, Iowa, daily says: "Because of injuries received while riding with Charles E. B., Miss Sadie C. has brought suit against the former for $10,000. Defendant was paying Miss C. company at the time, and had invited her to accompany him for the drive. Plaintiff alleges that the harness was defective and that her escort had no right to drive such a fiery team."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABATEMENT AND REVIVAL—Pendency of Foreign Action.—Under Code, §§ 3561, 3563, 3642, the pendency of an action in foreign jurisdiction between the same parties for the same cause is not ground for abatement.—Schmidt v. Posner, Iowa, 106 N. W. Rep. 760.

2. ACCORD AND SATISFACTION—Receipt in Full.—A dispute between insured's administratrix and the insurance company held not a sufficient consideration to support a receipt for less than the amount due in full settlement as an accord and satisfaction —Prudential Ins. Co. v. Cottingham, Md., 63 Atl. Rep. 359.

3. ACTION—Statutory Remedies — Where a statute gives a new right and prescribes a remedy for its enforcement, the prescribed remedy is exclusive.—Richardson v. People's Life & Accident Ins Co., Ky., 92 S. W. Rep. 284.

4. ADVERSE POSSESSION—Time.—Twenty years' adverse possession of wild lands before passage of Pub. Laws Me. 1895, ch. 162, would not bar suit by former owner to recover possession, if adverse possession did not continue for five years following the passage of the act.—Soper v. Lawrence Bros. Co., U. S. S. C., 26 Sup. Ct. Rep. 473

5. ALIENS—Judgments.—A foreign corporation held not entitled to impound property to satisfy a judgment against a nonresident and alien debtor. — Disconto Gesellschaft v. Terlinden, Wis., 106 N. W. Rep. 821.

6. ANIMALS—Right to Kill Dog.—Rev. Laws, ch. 102, §§ 128, 143, held not to justify killing of a dog, unless it can be done without committing a trespass.—Moore v. Mills, Mass , 77 N. E. Rep. 638.

7. APPEAL AND ERROR—Action on Appeal Bond.—In an action on an appeal bond, one executing it under circumstances that would estop him to assert want of consideration cannot avoid liability on the ground that plaintiff is estopped to assert consideration. — Locke v. Skow, Neb., 106 N. W. Rep. 1013.

8. APPEAL AND ERROR—Arguments —A motion by appellee to strike out appellant's argument because not in compliance with the rules will not be sustained where appellee's argument is equally faulty.—McDermott v. Mahoney, Iowa, 106 N. W. Rep. 925.

9. APPEAL AND ERROR—Harmless Error.—Exercise of the trial court's discretion in denying an application for leave to appeal from a probate order after time had expired will not be disturbed in the absence of a clear showing that the court's discretion had been abused.—*In re* O'Hara's Will, Wis., 106 N. W. Rep. 848.

10. APPEAL AND ERROR—Instructions.—A request to the judge outside the courtroom to change the form of a requested instruction held not sufficient to entitle the party making the request to allege error in giving the instruction unchanged.—McDermott v. Mahoney, Iowa, 106 N. W. Rep. 925.

11. APPEAL AND ERROR —Refusal of Writ of Habeas Corpus.—No appeal or writ of error lies to review an order refusing to issue a writ of *habeas corpus*.—People v. McAnally, Ill., 77 N. E. Rep. 544.

12. APPEAL AND ERROR—Remittitur.—A remittitur will be permitted by an appellate court where it can reasonably estimate the excess in the verdict or judgment and it is apparent that no injury came to the defendant by such action.—Smoot v. Kansas City, Mo., 92 S. W. Rep. 363.

13. APPEAL AND ERROR—Review.—Where decree finding personal liability in foreclosure is to an extent interlocutory, yet as to findings of fact made on issues pleaded it is not subject to review on objections to deficiency judgment.—Parratt v. Hartsuff, Neb., 106 N. W. Rep. 966.

14. APPEAL AND ERROR—Severable Decree.—Where a decree in chancery composed of distinct parts is severable, each part may be treated as a distinct decree, and an appeal taken from only one part without affecting the others.—Kouka v. Kouka, Ill., 77 N. E. Rep. 556.

15. APPEAL AND ERROR—Sufficiency of Evidence.—Questions as to the legal sufficiency of plaintiff's evidence cannot be considered on appeal in the absence of exceptions in the record presenting the question.—Walker v. Baldwin & Frick, Md., 63 Atl. Rep. 362.

16. APPEARANCE—Quo Warranto.—Where respondent appeared and pleaded issuably to an information in the nature of *quo warranto*, it could not afterwards complain that leave of court to sue had not been obtained.—Attorney-General v. A. Booth & Co., Mich., 106 N. W. Rep. 868.

17. ARSON—Evidence.—On a prosecution for arson, it was error to permit a witness to testify that he could have saved certain persons who were burned in the building had he known they were there.—State v. Harvey, Iowa, 106 N. W. Rep. 938.

18. ATTACHMENT—Pending Purchase.—The subsequent purchaser of land on which attachment has been levied cannot question the existence of the grounds on which the writ was issued.—Wagner v. Wolf, Neb., 106 N. W. Rep. 1024.

19. BANKRUPTCY—Preferences.—A preferential payment by one subsequently becoming a bankrupt cannot be recovered by his trustee, unless the creditor receiving payment had reasonable cause to believe that the debtor was insolvent.—Suffel v. McCartney Nat. Bank, Wis., 106 N. W. Rep. 837.

20. BANKS AND BANKING—Collections.—A bank to which a certificate of deposit is given for collection is negligent in sending the same directly to the payor for collection, rendering such sender liable for any loss resulting.—First Nat. Bank v. Bank of Whittier, Ill., 77 N. E. Rep. 563.

21. BANKS AND BANKING—Insolvency.—By the execution of a bond to the state, as provided by Cobbey's Ann. St. 1903, § 3735, by the officers of an insolvent bank, conditioned on the full settlement of all the liabilities of such bank, the officers and sureties cannot use the assets in paying the expenses thereof.—Hume v. Miller, Neb., 106 N. W. Rep. 1006.

22. BANKS AND BANKING—Stockholder's Liability.—Valid obligation of national bank after voluntary liquidation can be enforced against stockholder who voted against liquidation, when requisite amount of stock was voted in favor of such course.—Poppleton v. Wallace, U. S. S. C., 26 Sup. Ct. Rep. 498.

23. BASTARDS—Credibility of Complainant.—Where, in bastardy, there is a variance between the testimony of the complaining witness given at the preliminary and her testimony at the trial, on request the court should instruct on this variance as affecting her credibility.—Quinn v. Eggleston, Neb., 106 N. W. Rep. 976.

24. BILLS AND NOTES—Bona Fide Holders.—A bank, discounting a negotiable paper for a depositor, giving him credit therefor on its books for the proceeds, held not a *bona fide* holder.—City Deposit Bank v. Green, Iowa, 106 N. W. Rep. 942.

25. BILLS AND NOTES—Liability of Makers.—Persons signing notes under the representation that they were signing other papers creating no obligation held entitled to a cancellation of the notes.—Hulett v. Marine Sav. Bank, Mich., 106 N. W. Rep. 879.

26. BOUNDARIES—Ascertainment of Line.—Where adjoining landowners endeavor to ascertain the true boundary line, and in so doing an erroneous line is agreed on by mistake or accident, the agreement is not binding.—Sonnemann v. Mertz, Ill., 77 N. E. Rep. 550.

27. BOUNDARIES—Lots Abutting on Lake.—The transfer of a lot abutting on a lake by number, according to the government survey, without words of restriction, conveys all the land which has become part of the lot by the rescession of the lake.—Sherwin v. Bitzer, Minn., 106 N. W. Rep. 1046.

28. BROKERS—Commission When Earned.—A broker employed to procure a buyer of a patent is entitled to his commission when he produces a customer who is able, ready, and willing to pay the price, and whom the owner accepts.—Taylor v. Schofield, Mass., 77 N. E. Rep. 652.

29. BROKERS—Completion of Services.—A broker held entitled to commissions where the sole reason for the failure of the sale was the refusal of the seller's wife to execute the deed.—Tebo v. Mitchell, Dela., 63 Atl. Rep. 827.

30. BROKERS—Necessity of License.—The Baltimore city charter (Acts 1893, pp. 507, 508, ch. 123, §§ 695, 700) held not to preclude a real estate broker from recovering on a contract, though he had no license at the time it was made.—Walker v. Baldwin & Frick, Md., 63 Atl. Rep. 862.

31. CARRIERS—Bill of Lading.—A bill of lading held a through contract of carriage, rendering the initial carrier liable for delay occurring through the negligence of a connecting carrier.—Ingwersen v. St. Louis & H. Ry. Co., Mo., 92 S. W. Rep. 357.

32. CARRIERS—Conditions of Ticket.—A railway ticket stipulating for identification of a passenger as original purchaser held not to require identification to the satisfaction of the railway conductor.—Southern Ry. Co. v. Cassell, Ky., 92 S. W. Rep. 281.

33. CARRIERS—Degree of Responsibility.—A common carrier is an insurer except for a loss occasioned by the inherent quality of or defect in the goods shipped, the act of God or the owner or the public enemy.—J. H. Cownie Glove Co. v. Merchants Dispatch Transp. Co., Iowa, 106 N. W. Rep. 749.

34. CARRIERS — Liability of Connecting Carriers.—Where plaintiff admitted that no injury to his horses occurred on the line of one of two connecting carriers jointly sued, it was proper to direct a verdict for such carrier.—Ft. Worth & D. C. Ry. Co. v. Garlington, Tex., 92 S. W. Rep. 270.

35. CARRIERS—Limiting Liability.—Where a carrier had but one freight rate between the points embracing a stock shipment, limited liability clauses contained in the contract in consideration of a reduced rate were without consideration and unenforceable.—Ficklin & Son v. Wabash R. Co., Mo., 92 S. W. Rep. 647.

36. CARRIERS—Personal Injuries.—Where a passenger riding on a freight train in charge of stock was injured by the carrier's negligence, and sued in tort, proof that the transportation was had under a special contract did not constitute a fatal variance.—Lake Shore & M. S. Ry. Co. v. Teeters, Ind., 77 N. E. Rep. 599.

37. CARRIERS—Persons in Charge of Stock.—A person in charge of live stock and riding on the train carrying the stock held a passenger for hire.—Evansville & T. H. R. Co. v. Mills, Ind., 77 N. E. Rep. 608.

38. CARRIERS—Who are Passengers.—A person traveling on a freight train on a shipper's pass in charge of a car of horses is a passenger.—Southern Ry. Co. v. Roach, Ind., 77 N. E. Rep. 606.

39. CERTIORARI—Proceedings of Municipal Boards.—The supreme court of Cook county has jurisdiction to issue a writ of *certiorari* to review the action of the civil service commission of the city of Chicago in removing a policeman.—Powell v. Bullis, Ill., 77 N. E. Rep. 575.

40. CHAMPERTY AND MAINTENANCE—Judicial Sales—The statute of champerty has no application to sales which are made under judicial orders.—Cook v. Burton, Ky., 92 S. W. Rep. 322.

41. CHARITIES—Want of Corporate Capacity.—A valid trust in aid of religious, charitable, or educational enterprises is not void because of lack of corporate capacity in the beneficiary designated.—Lewis v. Curnutt, Iowa, 106 N. W. Rep. 914.

42. CONSPIRACY—Wrongful Attachment.—An action against several defendants for conspiring to injure plaintiff's business by maliciously suing out attachments without probable cause cannot be maintained against the defendants jointly, where there is no evidence of conspiracy.—Sebon, Blake & Stevenson v. Whitt, Ky., 92 S. W. Rep. 280.

43. CONSTITUTIONAL LAW—Compelling the Lowering of Tunnel Under River.—Contract obligations held not impaired by compelling street railway company at its own expense to lower or remove a tunnel constructed by it under the Chicago river.—West Chicago St. Ry. Co. v. People of Illinois, U. S. S. C., 26 Sup. Ct. Rep. 518.

44. CONSTITUTIONAL LAW—Rules of State Board of Health.—Code, § 2573, providing that a person violating a rule of the state board of health is guilty of a misdemeanor, and punishable as provided in section 4906, held not unconstitutional as a delegation of legislative power to such board.—Pierce v. Doolittle, Iowa, 106 N. W. Rep. 751.

45. CONTEMPT—Violation of Injunction.—In a prosecution for constructive contempt in violating an injunction, the affidavit of information must set forth the acts constituting the violation.—Back v. State, Neb., 106 N. W. Rep. 787.

46. CORPORATIONS—Right to Hold Land.—Where a corporation obtained title to land from a trustee, the *cestui que* trust was estopped from alleging that the act of the corporation in obtaining title was *ultra vires*—State Security Bank v. Hoskins, Iowa, 106 N. W. Rep. 764.

47. CORPORATIONS—Service on Salesman.—A traveling salesman of a domestic mercantile corporation is an agent on whom process against the corporation may be served within Comp. Laws, § 10,468.—Moinet v. Burnham, Stoepel & Co., Mich., 106 N. W. Rep. 1126.

48. CORPORATIONS—Transfer of Stock.—When the direct injury is to the corporate rights, the right to share in the compensation which the corporation may recover passes to the transferee of the shares.—Wells v. Dane, Me., 63 Atl. Rep. 324.

49. CORPORATIONS—Unlawful Combinations.—A corporation which has made an unlawful combination cannot object in proceedings in the nature of *quo warranto* that its co-contractors are not made parties defendant.—Attorney General v. A. Booth & Co., Mich., 106 N. W. Rep. 868.

50. CORPORATIONS—Venue.—That an agent is temporarily transacting business for a domestic corporation in a county other than the one where the corporation has its principal place of business does not subject the corporation to the jurisdiction of the courts of that county, under Code Civ. Proc., § 55.—Security Mut. Life Ins. Co. v. Ress, Neb., 106 N. W. Rep. 1037.

51. COURTS—Jurisdiction.—Where the court has jurisdiction of the subject-matter of an information in the nature of *quo warranto*, any want of jurisdiction because of failure to obtain leave of court to file the information may be waived.—Attorney General v. A. Booth & Co., Mich., 106 N. W. Rep. 868.

52. CREDITOR'S SUIT—National Banks.—No judgment at law on a note given by a national bank is prerequisite to a suit by the holder, one object of which is to subject to the satisfaction of the debt certain property conveyed to the trustee as security therefor.—Wyman v. Wallace, U. S. S. C., 26 Sup. Ct. Rep. 495.

53. CRIMINAL EVIDENCE—Conversations Between Third Persons.—Testimony of conversations between third persons out of the presence and hearing of accused, intending to incriminate him, are inadmissible.—Marks v. State, Tex., 92 S. W. Rep. 414.

54. CRIMINAL EVIDENCE—Secondary Evidence of Contents of Writing.—The admission of parol proof of the contents of a letter without proof of notification to the party having possession thereof to produce it, or of its loss or destruction, held error.—Young v. People, Ill., 77 N. E. Rep. 536.

55. CRIMINAL LAW—Argument of Counsel.—Where the bill of exceptions does not show any objections to the argument of the prosecuting attorney, and does not set forth the argument complained of, the court, on appeal, cannot consider the objection.—Taylor v. Commonwealth, Ky., 92 S. W. Rep. 292.

56. CRIMINAL TRIAL—Misconduct of Counsel.—Where an affidavit for a continuance was admitted as evidence, it was improper for commonwealth's attorney to tell the jury that the absent witness, if present, would not have made the statement contained in the affidavit.—Carroll v. Commonwealth, Ky., 92 S. W. Rep. 308.

57. DAMAGES—Distribution of Fund.—A husband of a deceased wife is not the next of kin of his wife within Act of March 3, 1848 (Gen. St., p. 1188, § 11), authorizing recovery for wrongful death.—Gottlieb v. North Jersey St. Ry. Co., N. J., 63 Atl. Rep. 339.

58. DAMAGES—Instructions.—Where the trial judge states what elements may enter into the ascertainment of damages to the exclusion of all other elements, he is not required to enumerate certain of the elements necessarily excluded.—Gottlieb v. North Jersey St. Ry. Co., N. J., 63 Atl. Rep. 339.

59. DAMAGES—Instructions.—In an action for injuries, an instruction on the measure of damages held not objectionable as charging that there was no rule of law by which the jury could estimate damages.—Richardson v. Nelson, Ill., 77 N. E. Rep. 583.

60. DEATH—What Law Governs.—Where a resident of Iowa was killed in an accident in Illinois, leaving a widow in Iowa, but no issue, and his Iowa administrator settled in Illinois, the proceeds were distributable to the widow under the Illinois law.—*In re* Coe's Estate, Iowa, 106 N. W. Rep. 743.

61. DEDICATION—Highways.—Where adjoining landowners place fences along the line between their lands so as to leave space for public travel, and the public used the intervening space as a highway for almost 20 years, it is a highway by dedication.—Cassidy v. Sullivan, Neb., 106 N. W. Rep. 1027.

62. DESCENT AND DISTRIBUTION—What Law Governs.—Personal property of a deceased person must be distributed according to the law of his domicile, irrespective of the place of administration.—*In re* Titterington's Estate, Iowa, 106 N. W. Rep. 761.

63. DIVORCE—Alimony.—An application for a change with respect to alimony, made at a subsequent term, must be founded on facts which have arisen since the decree.—Chambers v. Chambers, Neb., 106 N. W. Rep. 993.

64. DIVORCE—Cruelty.—By the express provisions of Ky. St. 1903, § 2117, a wife may have a divorce for habitual behavior on the part of the husband for not less than six months in such manner as indicates such a settled aversion to the wife as permanently destroys her peace or happiness.—Hooe v. Hooe, Ky., 92 S. W. Rep. 317.

65. DIVORCE—Custody of Children.—The matter of the custody of children after divorce is largely within the discretion of the court.—Chambers v. Chambers, Neb., 106 N. W. Rep. 993.

66. DIVORCE—Enforcement of Decree in Other State.—Mere domicile within the state of one party to a marriage

held not to give the courts of that state jurisdiction to render decree enforceable in all the other states by virtue of the full faith and credit clause of the federal constitution against nonresident who did not appear and was only constructively served.—Haddock v. Haddock, U. S. S. C., 26 Sup. Ct. Rep. 525.

67. DIVORCE — Expectancies. — A husband's probable earnings and accretions of wealth from any other source may be considered in determining the amount of alimony to be awarded to his wife, in an action for divorce.—Muir v. Muir, Ky., 92 S. W. Rep. 314.

68. DIVORCE—Property Rights.—Authority to grant a divorce carries with it authority to adjust property rights of the parties in personalty within the jurisdiction.—Hays v. Hays, Neb., 106 N. W. Rep. 778.

69. DOMICILE—Residence.—A change of domicile is effected by actual residence and intent to change, regardless of a floating intention to return to another place at a future time.—*In re* Titterington's Estate, Iowa, 106 N. W. Rep. 761.

70. DRAINS—Surface Water.—A sluiceway for surface water along a highway held not a neighborhood drain, which the highway authorities were precluded from obstructing.—Tower v. Somerset Tp., Mich., 106 N. W. Rep. 874.

71. ELECTRICITY—Care Required. — The danger incident to the use of electricity is imminent, and a high degree of watchfulness for the prevention of accidents is imposed on those handling it.—Wilbert v. F. Zurheide Brick Co., Wis., 106 N. W. Rep. 1050.

72. EQUITY — Forfeitures. — Equity will not enforce against a vendee a technical forfeiture of an executory contract for the sale of land if defendant offers to do equity.—Yeiser v. Portsmouth Sav. Bank, Neb., 106 N. W. Rep. 784.

73. EQUITY—Sufficiency of Bill.—A bill by a donee to establish a gift held insufficient for failing to allege whether the donor died testate or intestate, or to whom his property would pass if he died intestate.—Graham v. Spence, N. J., 63 Atl. Rep. 344.

74. ESCROWS—Memorandum.—A memorandum of the terms of an escrow, written by the custodian on the deed so deposited, held not conclusive.—Francis v. Francis, Mich., 106 N. W. Rep. 864.

75. EVIDENCE—Written Contract.—The rule that parol evidence will not be admitted to vary a written contract does not apply as between strangers to the contract, nor as between a party and a stranger.—Shreve v. Crosby, N. J., 63 Atl. Rep. 333.

76. EXECUTION—Action to Restrain.—In a suit to restrain an assignee of a judgment from collecting it, the burden of proving ownership of the judgment is on the person attempting to collect it.—Henning v. Colsch, Iowa, 106 N. W. Rep. 922.

77. EXECUTORS AND ADMINISTRATORS — Admissibility of Evidence.—In an action against an executor for personal services rendered decedent, evidence of appraisers as to what they found in the kitchen and larder something like a month after decedent died was not admissible.—McGrew's Ex'r v. O'Donnell, Ky., 92 S. W. Rep. 301.

78. EXECUTORS AND ADMINISTRATORS—Claims Against Estate.—Plaintiff's right to recover for board and money furnished defendant's testator held not taken away by his expectation that actual reimbursement would come through his wife's inheritance from the testator.—Wirth v. Kuehn, Mass., 77 N. E. Rep. 641.

79. EXECUTORS AND ADMINISTRATORS—Refusal to Act. —Where executors are authorized by the will to partition and sell real estate, their power devolves upon the court if the executors are disqualified or refuse to act.—O'Donaghue v. Smith, N. Y., 77 N. E. Rep. 621.

80. FEDERAL COURTS—Questions of Local Law.—What facts constitute a common-law marriage is a local and not a federal question, and will not sustain a writ of error from the Supreme Court of the United States to a state court.—Keen v. Keen, U. S. S. C., 26 Sup. Ct. Rep. 494.

81. FIRE INSURANCE—Loss by Explosion.—Where an explosion is caused by a fire on the insured property, and is a mere incident of the preceding fire, the fire is the cause of the whole loss within the risk insured.—Hall & Hawkins v. National Fire Ins. Co., Tenn., 92 S. W. Rep. 402

82. FIRE INSURANCE — Payment of Premium —A fire policy may be delivered on the insured's promise to pay the premium in the future, payment in cash not being necessary to complete delivery, where there is no provision to that effect in the policy.—Green v. Star Fire Ins. Co., Mass., 77 N. E. Rep. 649.

83. FIXTURES—Landlord and Tenant.—A lease of a store containing store fixtures held to preclude the lessee from subsequently claiming such fixtures as against the lessor's grantee.—Baringer v. Evenson, Wis., 106 N. W. Rep. 801.

84. HEALTH—Legislative Powers.—The legislature has power to provide for the punishment of acts in resistance to or violation of authority conferred by it on the state board of health to adopt regulations for the public health —Pierce v. Doolittle, Iowa, 106 N. W. Rep. 751.

85. HIGHWAYS—Obstructions.—Public highways belong from side to side and end to end to the public, and any permanent structure encroaching thereon is a nuisance *per se*.—Bischof v. Merchants Nat. Bank, Neb., 106 N. W. Rep. 996.

86. HOMICIDE—Intent.—In a prosecution for assault with intent to commit murder, the intent to murder may be proved either by direct or circumstantial evidence.—State v. Brown, Del., 63 Atl. Rep. 828.

87. HUSBAND AND WIFE—Contracts of Wife.—A married woman cannot bind herself at law to pay for her board while living with her husband and engaged in no business.—Chickering-Chase Bros. Co. v. L. J. White & Co., Wis., 106 N. W. Rep. 797.

88. HUSBAND AND WIFE—Crimes by Wife.—It is presumed that the participation of a wife in the crime of her husband is the result of coercion on his part.—State v. Harvey, Iowa, 106 N. W. Rep. 988.

89. HUSBAND AND WIFE—Wife's Separate Property.—Where a married woman owns real estate in her own right, except when such real estate is a homestead, in order to convey a good title it is not necessary that her husband should join in the conveyance. — Jordan v. Jackson, Neb., 106 N. W. Rep. 999

90. INJUNCTION—Removable Fixtures —An owner of land is entitled to injunction to prevent the removal of an article which has become so attached to the land as to be a part thereof —State Security Bank v. Hoskins, Iowa, 106 N. W. Rep. 764.

91. INTOXICATING LIQUORS — Ordinance Establishing Saloon Limits.—A city ordinance establishing saloon limits and prohibiting the operation of saloons except within such limits held not invalid for failure to prescribe a penalty and provide for its enforcement.—Johnson v. Common Council of City of Bessemer, Mich., 106 N. W. Rep. 852.

92. INTOXICATING LIQUORS—Sale Contrary to Law.—A proceeding under Kirby's Dig. § 5137, for the destruction of liquor shipped into a prohibited district to be sold contrary to law, held a proceeding *in rem*.—Osborne v. State, Ark., 92 S. W. Rep 406.

93. JUDGMENT—Amount of Damages Demanded.—In an action for personal injuries, there can be no recovery for doctor's fees or loss of time in excess of the amounts claimed in the petition for such items.—Smoot v. Kansas City, Mo., 92 S. W. Rep 363.

94. JUDGMENT—Collateral Attack.—A judgment by a district court in conformity with a permissible interpretation of an obscure mandate from the supreme court is not subject to collateral attack.—Clark v. Parks, Neb., 106 N. W. Rep. 770.

95. JUDGMENT—Ejectment.—The doctrine of *res judicata* does not apply to statutory new trials in ejectment. —Weigel v. Green, Ill., 77 N. E. Rep. 574.

96. JUDGMENT — Finality. — A matter, including all phases thereof which are or should have been brought to the consideration of the court, which has been once litigated and passed into judgment or decree, is to be considered as settled.—Crockett v. Crockett, Iowa, 106 N. W. Rep. 944.

97. LIBEL AND SLANDER—What Constitutes —A newspaper article charging a person with originating and circulating false and malicious reports atttacking the character of another is libelous *per se*.—Sheibley v. Huse, Neb., 106 N. W. Rep. 1020.

98. LIENS—Mortgages.—Mortgagee in a mortgage executed by a curator on lands of his wards to obtain money to pay a pre existing incumbrance held not entitled to an equitable lien on the property.—Capen v. Garrison, Mo., 92 S. W. Rep. 868.

99. LIFE INSURANCE—Acceptance. — Where an insurance company rejected an application for $10,000 life insurance and issued a policy for $5,000, there was no acceptance and no contract of insurance existed —New York Life Ins Co. v. Levy's Adm'r, Ky., 92 S. W. Rep. 325.

100. LIFE INSURANCE—Equitable Ownership.—The executor of an insured in a policy payable to insured's executors, etc., cannot recover on the policy as against the defense of an existing valid assignment.—Harrison's Adm'r v. Northwestern Mut. Life Ins. Co., Vt., 63 Atl. Rep. 821.

101. LIFE INSURANCE—Misstatements in Applications.—Where policies were issued on an application containing false statements written therein by insurer's agent, it was insured's duty, on discovering the fraud, to disclose the same to the insurance company, and tender the policy for cancellation.—Curry v. Stone, Tex., 92 S. W. Rep. 263.

102. LIFE INSURANCE — Statement of Occupation.—Whether the keeper of a house of ill-fame is a housewife, as stated by her in an application for a policy of insurance, was for the jury.—Perry v. John Hancock Mut. Life Ins. Co., Mich., 106 N. W. Rep. 860.

103. LIMITATION OF ACTIONS—Commencement of Action.—Where an alias writ in an action in *assumpsit* has been returned "not found," a pluries writ issued six years thereafter is barred by limitation.—Rees v. Clark, Pa., 63 Atl. Rep. 864.

104. LIMITATION OF ACTIONS—Reviving Debt.—To cut off the running of the statute of limitations there must be a clear and express promise to pay the claim to which the statute applies, and loose declarations are insufficient.—McGrew's Ex'r v. O'Donnell, Ky., 92 S. W. Rep. 301.

105. MALICIOUS PROSECUTION—Actions for Damages.—In an action for wrongfully suing out attachments, an instruction that defendants were liable if they procured the attachments without just or legal cause held erroneous.—Schon, Blake & Stevenson v. Whitt, Ky., 92 S. W. Rep. 280.

106. MALICIOUS PROSECUTION—Burden of Proof.—In an action for malicious prosecution, a discharge of plaintiff on *habeas corpus* after conviction before a justice because the justice had no jurisdiction of the offense held insufficient to show want of probable cause.—Pierce v. Doolittle, Iowa, 106 N. W. Rep. 751.

107. MANDAMUS—Scope of Writ.—*Mandamus* held maintainable to review a circuit court order denying leave to relator to take a special appeal from a justice's judgment.—Graham v. Hosmer, Mich., 106 N. W. Rep. 1109.

108. MASTER AND SERVANT—Assumed Risk.—An employee driving his team down a steep place on a dump held to have assumed the risk of injury to his team.—Lindsey v. Hollerback & May Contract Co., Ky., 92 S. W. Rep. 294.

109. MASTER AND SERVANT—Contributory Negligence.—A planer operator held guilty of contributory negligence in attempting to pass a board over instead of through the rear rollers of the machine.—Smith v. Forrester-Nace Box Co., Mo., 92 S. W. Rep. 894.

110. MASTER AND SERVANT—Defective Appliances.—The rule that a master is not liable for injuries resulting from defects in very simple tools has no application where the master has actual knowledge of the defect and the employee has not.—Stork v. Charles Stolper Cooperage Co., Wis., 106 N. W. Rep. 841.

111. MASTER AND SERVANT—Fellow Servants.—Where an operator of a printing press while running the machine starts it without warning and the helper is injured, the relation is that of fellow servants, though the helper is under the control of the operator.—Doerr v. Daily News Pub. Co., Minn., 106 N. W. Rep. 1044.

112. MASTER AND SERVANT—Fellow Servants.—Where a master had used sufficient care, it was not liable for the death of its servant resulting from the acts of other servants in the absence of defendant's foremen.—Chrismer v. Bell Telephone Co., Mo., 92 S. W. Rep. 878.

113. MASTER AND SERVANT—Negligence.—In an action for wrongful death resulting from decedent's falling down a coal shaft, evidence examined, and held to make out a clear case of *res ipsa loquitur*.—Texas & P. Coal Co. v. Daves, Tex., 92 S. W. Rep. 275.

114. MASTER AND SERVANT—Safe Place to Work.—The master does not guaranty the safety of his servants, but is bound simply to use reasonable care in providing a safe place to work in.—Cudahy Packing Co. v. Wesolowski, Neb., 106 N. W. Rep. 1007.

115. MASTER AND SERVANT—Warning of Dangers Assumed.—A warning to a servant employed at a paper-slitting machine, against getting her hands caught in the slitters, held insufficient to apprise her of the danger from set screws holding the slitters in position on the shaft.—Van De Bogart v. Marinette & Menominee Paper Co., Wis., 106 N. W. Rep. 805.

116. MINES AND MINERALS—Lode Location.—The south end of a lode mining claim, separated from the rest of the claim by a patented placer claim, held not to become part of the public domain, subject to relocation, until claimant elected to retain and patent the north end of the claim, though such election was not made within 60 days, given for that purpose by the land department.—Brown v. Gurney, U. S. S. C., 26 Sup. Ct. Rep. 509.

117. MORTGAGES—Assumption of Debt.—A purchaser of certain land held never to have become liable for a debt secured by a mortgage thereon as between herself and her vendor.—Marling v. Milwaukee Realty Co., Wis., 106 N. W. Rep. 844.

118. MORTGAGES—Estoppel of Mortgagor.—A mortgagor held not entitled to assert the invalidity of the mortgage on the ground that the mortgagee is a foreign corporation which has not complied with the statutes.—Prudential Ins. Co. v. Cushman, Iowa, 106 N. W. Rep. 934.

119. MORTGAGES—Foreclosure and Sheriff's Sale.—A sheriff's deed on foreclosure takes precedence from its record over all outstanding conveyances and incumbrances executed by the judgment debtor not recorded, and of which the purchaser had no actual notice.—Getchell v. Roberts, Neb., 106 N. W. Rep. 781.

120. MUNICIPAL CORPORATIONS—Authority of Officers.—Though a street commissioner of a city had no authority to purchase stone, stone furnished under a contract with him having been used on the streets of the city, it was liable to the seller for the value.—Central Bitulithic Pav. Co. v. City of Mt. Clemens, Mich., 106 N. W. Rep. 888.

121. MUNICIPAL CORPORATIONS—House Slants.—A city ordinance requiring house slants for a sewer pipe of a special internal diameter held to require house slants of the thickness ordinarily used with sewer pipes of the specified internal diameter.—Sheedy v. City of Chicago, Ill., 77 N. E. Rep. 539.

122. MUNICIPAL CORPORATIONS—Incorporation.—The law relating to the incorporation of villages does not contemplate including in the corporate limits remote territory or agricultural lands.—State v. Clark, Neb., 106 N. W. Rep. 971.

123. MUNICIPAL CORPORATIONS—Obstructions in Streets. —In an action against a city and the owner of a lot for injuries resulting from the tipping over of a pile of lumber, evidence held to require submission to the jury of the question of defendant's negligence.—Snyder v. Arnold, Ky., 92 S. W. Rep. 289.

124. MUNICIPAL CORPORATIONS—Obstruction in Streets. —Driver injured while driving along street where embankment had been thrown up held guilty of contributory negligence, barring right to recover therefor from the city.—Village of Lockport v. Licht, Ill , 77 N. E. Rep. 581.

125. MUNICIPAL CORPORATIONS—Special Assessments. —The presumption arising from the report of the superintendent of special assessments, that omitted property was not benefited, is not overcome by the fact that such property abuts on the proposed improvement.—Sheedy v. City of Chicago, Ill., 77 N. E. Rep. 539.

126. MUNICIPAL CORPORATIONS—Street Improvements. —A provision for stipulated damages in a contract for the making of a street improvement in case of a delay in the completion of the improvement held binding upon the contractor.—Central Bitulithic Pav. Co. v. City of Mt. Clemens, Mich., 106 N. W. Rep. 888.

127. NAVIGABLE WATERS—Street Railroad Tunnel.—Rights of street railway company in tunnel under navigable river held subject to paramount right of navigation in such river —West Chicago St. R. Co. v. People of State of Illinois, U. S. S. C., 26 Sup. Ct. Rep. 518.

128. NEGLIGENCE—Children.—Children who have arrived at sufficient age to be capable of exercising some degree of care for their own safety must exercise the ordinary and reasonable care which ought to be expected of children of like age, capacity, intelligence, and experience.—Illinois Cent. R. Co. v. Johnson, Ill., 77 N. E. Rep. 592.

129. NEGLIGENCE—Concurring Causes.—If a person is guilty of negligence resulting in injury to another, the fact that a third person concurs or co-operates in producing the injury, or contributes thereto, does not relieve the first tort feasor of liability.—Snydor v. Arnold, Ky., 92 S. W. Rep. 289.

130. NUISANCE—Easement of View.—The easement of view from every part of the public street belongs to one owning property abutting on the street.—Bischof v. Merchants' Nat. Bank, Neb., 106 N. W. Rep. 996.

131. NUISANCE—Erection of Buildings.—Injunction will lie to prevent the erection of buildings in violation of an ordinance, if their erection works special or irreparable injury to plaintiff or his property.—Bangs v. Dworak, Neb., 106 N. W. Rep. 780.

132. NUISANCE—Permanancy.—A structure on a street constituting a nuisance, maintained in violation of a positive statute, not an inseparable part of the unfinished building to which it is attached, held not a permanent nuisance.—Bischof v. Merchants' Nat. Bank, Neb., 106 N. W. Rep 996.

133. OFFICERS—Compensation. — Where the law requires a public officer to look for compensation to the fees of his office, he must look to such source alone.—Power v. Douglas County, Neb., 103 N. W. Rep 782.

134. PAYMENT—Innocent Third Parties.—Under certain contracts, a purchaser of goods from an importer held entitled to recover from the bankers, who issued letters of credit under which the goods were purchased, an amount paid in excess of the contract price.—Moors v. Bird, Mass., 77 N. E. Rep. 643.

135. PLEDGES—Sale of Pledged Goods.—A sale by merchants of property held by them under a trust receipt given to bankers who had issued letters of credit under which the property was purchased held to amount to a sale by the bankers.—Moors v. Bird, Mass., 77 N. E. Rep. 643.

136. PRINCIPAL AND AGENT—Employment of Agent.—A conductor of a railroad train had no authority to employ a physician to attend a trespasser who had been run over by the train owing to his own negligence.—Wills v. International & G. N. R. Co., Tex., 92 S. W. Rep. 273.

137. PRINCIPAL AND AGENT—Misrepresentations of Agent to Third Party.—A mortgagee which authorizes its agent to negotiate a sale for the mortgagor, that its claim may be satisfied, held liable for the agent's misrepresensations as to title.—John Gunn Brewing Co. v. Peterson Iowa, 106 N. W. Rep. 741.

138. QUO WARRANTO—Incorporation of Village.—An owner of agricultural land may maintain *quo warranto* to determine the validity of an order of incorporation of a village to which his property is annexed.—State v. Clark, Neb., 106 N. W. Rep. 971.

139. REPLEVIN—Attached Property. — Replevin will not lie to recover property in possession of the sheriff under a writ of attachment against a third person.—Baltimore, C. & A. Ry. Co. v. H. Klaff & Co., Md , 63 Atl. Rep. 360.

140. SALES—Action for Breach.—Where, in an action to recover for breach of a contract to deliver cattle, plaintiff proved the contract price and the market price of the cattle, no further burden rest on him.—McKay v. Elder, Tex., 92 S. W. Rep. 268.

141. SALES—Delay in Delivery.—In an action for delay in delivering certain goods, defendant held not to have waived his right to recover compensation by receiving the goods after the time agreed on —Murmann v. Wissler, Mo., 92 S. W. Rep. 355.

142. SALES—Liens.—An adjudication in bankruptcy held not the equivalent of a judgment or attachment, so as to operate as a lien in favor of trustee against conditional vendor of property sold to bankrupt, because of noncompliance with the requirement as to filing, made by Rev. St. Ohio, § 4155.—York Mfg. Co. v. Cassell, U. S. S. C., 26 Sup. Ct. Rep. 481.

143. SALES—Resale by Seller.—Where the purchaser of coal refused to receive it on the ground that it was not the variety of coal he had purchased, he could not thereafter assert that he was justified in rejecting it because not of a merchantable quality.—Ginn v. W. C. Clark Coal Co., Mich., 106 N. W. Rep. 887.

144. SCHOOLS AND SCHOOL DISTRICTS—Religious Garb. —Where teachers in a public school refuse to comply with the regulations forbidding the use of religious dress in the schools after notice thereof, they forfeit their right to further compensation under their contract of employment.—O'Connor v. Hendrick, N. Y., 77 N. E. Rep. 612.

145. SHIPPING—Injury to Goods.—Where a carrier did not give proper notice to the consignee to appear and take charge of the freight, and allow reasonable time thereafter for him to do so, but unloaded the freight upon a pier which collapsed, so as to injure the goods, the carrier was liable, irrespective of the question of negligence.—Rosenstein v. Vogemann, N. Y., 77 N. E. Rep. 625.

146. STATUTES—Construction.—All statutes on the same general subject are regarded as part of one system, and later statutes are to be considered as supplementary to those preceding them on the same subject.—State v. Omaha Elevator Co , Neb., 106 N. W. Rep. 979.

147. STREET RAILROADS — Collision with Team.—The driver of a team starting to cross a street railroad held to have the right to assume that the motorman of a car will give him time to cross.—Williamson v. Old Colony St. Ry. Co , Mass., 77 N. E. Rep. 655.

148. STREET RAILROADS — Contributory Negligence.—Plaintiff held guilty of contributory negligence in failing to look for the approach of a street car, by which he was struck, which followed closely after a car he permitted to pass, before stepping on the track.—Moore v. St. Louis Transit Co., Mo., 92 S. W. Rep. 390.

149. STREET RAILROADS—Extension of Term of Franchise.—Intention to prolong life of a street railway franchise from the date of its termination February 10, 1908, held inferrable from ordinance authorizing consolidated company to extend its line and change to electricity.—City of Cleveland v. Cleveland Electric Ry. Co., U. S. S. C., 26 Sup. Ct. Rep. 513.

150. STREET RAILROADS—Failure to Ring Bell.—Where one injured by being struck by a street car saw the car approaching, the failure of the motorman to ring the bell afforded no ground of complaint.—Heintz v. St. Louis Transit Co., Mo , 92 S. W. Rep. 853.

151. STREET RAILROADS—Premature Starting of Car.—In an action against a street railway for injuries to a passenger, failure of defendant's conductor to wait until such passenger had reached her seat before starting the car held not negligence.—Weeks v. Boston Elevated Ry. Co., Mass., 77 N. E. Rep 654.

152. SUBROGATION — Furnishing Money to Pay Mortgage.—A mortgagee in a mortgage executed by a curator on the land of his wards for the purpose of securing money to satisfy a pre existing mortgage held not entitled to be subrogated to the rights of the mortgagee in the mortgage so satisfied.—Carden v. Garrison, Mo., 92 S. W. Rep. 868.

153. SUNDAY—Sale of Intoxicating Liquors.—The Sunday law is not suspended as to a licensed liquor dealer by reason of his license.—Bennett v. State, Tex., 92 S. W. Rep. 415.

154. SUNDAY—Work of Necessity. — Gathering of crop held not work of necessity within St. 1904, § 477, ch. 460, § 2.—Commonwealth v. White, Mass., 77 N. E. Rep. 636.

155. TAXATION—Remedies of Property Holders.—The remedy in the first instance of one who conceives that his property has been excessively valued for taxation is to apply to the board of equalization.—Hall v. Moore, Neb., 106 N. W. Rep. 785.

156. TAXATION—Tax Sale.—A purchaser at a tax sale under a tax judgment against the record owner acquires title as against the holder of an unrecorded deed from the apparent owner. — Evarts v. Missouri Lumber & Mining Co., Mo., 92 S. W. Rep. 873.

157. TELEGRAPHS AND TELEPHONES — Misdelivery of Message.—Telegraph company held not liable for damages to person to whom telegram was delivered other than the addressee.—Bowyer v. Western Union Telegraph Co., Iowa, 106 N. W. Rep. 748.

158. TRIAL—Assumption as to Facts —In an action against an executor for services rendered to decedent, an instruction held erroneous because assuming that the amount, if any, due to plaintiff, was greater than an amount due from plaintiff to decedent upon certain notes —McGrew's Ex'r v. O'Donnell, Ky., 92 S. W. Rep. 301.

159. TRIAL—Special Interrogatories.—Special interrogatories will not overthrow general verdict, unless there is such antagonism on material questions as to be beyond probability of being overthrown by any evident admissibility under the issues.—Lake Shore & M. S. Ry. Co. v. Towers, Ind., 77 N. E Rep 599.

160. TRUSTS—Distribution.—To make a valid decree for the management and distribution of a testamentary trust fund, it is not necessary that the court should obtain jurisdiction of each person interested by personal service such as would be necessary for an adversary suit *in personam*.—Minot v. Purrington, Mass., 77 N. E. Rep. 630.

161. TRUSTS—Equity Jurisdiction.—Equity held to have jurisdiction to declare that an executrix purchasing real estate with funds of estate in her own name and leaving the state holds it as trustee for the beneficiaries under the will.—Goodwin v. Colwell, Pa., 63 Atl. Rep. 368.

162. TRUSTS—Right to Revoke —The fact that a grantor conveying land in trust reserves the power of revocation held not to prevent the passing of a present interest by the delivery of the instrument creating the trust. — Lewis v. Curnutt, Iowa, 106 N. W. Rep. 914.

163. UNITED STATES—Civil Service. — A regular employee in the classified civil service of the United States held entitled to compensation during wrongful suspension by a subordinate officer.—United States v. Wickersham, U. S. S. C., 26 Sup. Ct. Rep. 469.

164. USURY—Questions for Jury.—Whether a sale of property in excess of its real value, to be again sold by the buyer to obtain money, was in good faith, or for the purpose and with the intent of evading the usury laws, is a question of fact.—Barry v. Paranto, Minn., 106 N. W. Rep. 911.

165. VENUE—Contempt Proceedings.—On prosecution for contempt in the district court, the judge before whom the cause is regularly to be heard may refuse to transfer it to another judge for hearing, unless some statutory ground for change of venue exists.—Back v. State, Neb., 106 N. W. Rep. 787.

166. WATERS AND WATER COURSES — Flowage. — An owner of land on which surface water accumulates held entitled to drain the basin by cutting through the rim at the lowest point thereof, though the water flows on adjoining land —Fenton & Thompson R. Co. v. Adams, Ill., 77 N. E. Rep. 581.

167. WILLS—Construction.—An ecclesiastical society incorporated for the maintenance of a church held not a missionary society entitled to take under a bequest of the residue of testator's estate to certain missionary societies referred to in the will.—Bulkeley v. Worthington Ecclesiastical Soc., Conn., 63 Atl. Rep. 351.

168. WILLS — Construction. — Issue, and not lawful heirs, held meant by the words *sucesion legitima*, in a devise of the residue of testator's estate —De Rodriguez v. Vivoni, U. S. S. C., 26 Sup. Ct. Rep. 475.

169. WILLS—Time of Payment of Legacy.—Bequest out of residuary estate held payable not at the final settlement of executors, but on payment of residuary estate to minor children of testator on reaching majority —McDevitt v. Hibben, Ill., 77 N. E. Rep. 586.

170. WILLS—Undue Influence.—That testator's reason is convinced by persuasion or argument does not show undue influence, if it is by his own will and intention that he carried his decision into effect.—Mueller v. Pew, Wis , 106 N. W. Rep. 840.

171. WITNESSES—Children. — Small children are not competent witnesses, unless it is shown that they know the nature of an oath.—Olson v. Olson, Iowa, 106 N. W. Rep. 758.

172. WITNESSES—Competency When Interested in Action.—A party to an action or interested in the event thereof is not competent to testify to conversations or admissions of a deceased party had with or made to a third party in his presence.—*In re* Pederson's Estate, Minn., 106 N. W. Rep. 958.

173. WITNESSES—Leading Questions.—In the examination of a hostile witness it was no abuse of discretion to permit counsel to lead him and refresh his memory, by calling his attention to his former testimony.—Hackney v. Raymond Bros Clark Co , Neb., 106 N. W. Rep. 1016.

174. WITNESSES—Refreshing Memory.—Where a record made by a witness did not refresh his recollection, and he testified that he could not swear to the facts except from the record, his evidence was properly excluded.—Ft. Worth & D. C. Ry. Co. v. Garlington, Tex., 92 S. W. Rep. 270.

175. WITNESSES—Scope of Cross-Examination.—Where a witness had testified on direct examination solely as to the value of the objector's property, and the amount it would be benefited by the improvement in question, whether the city would be benefited by the improvement was not proper cross-examination.—Sheedy v. City of Chicago, Ill., 77 N. E. Rep. 539.

176. WITNESSES—Scope of Cross-Examination.—Where facts from which an inference unfavorable to the accused are drawn from a witness, everything within the knowledge of the witness tending to rebut such an inference is admissible on cross examination.—State v. Harvey, Iowa, 106 N. W. Rep. 938.

177. WORK AND LABOR—Measure of Recovery.—In an action against an executor for personal services rendered to decedent, plaintiff held entitled to recover the reasonable value of the services rendered, and not such a sum as would reasonably compensate her for the services.—McGrew's Exr. v. O'Donnell, Ky., 92 S. W. Rep. 301.